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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WILLIAM E. ZIMSKY

Request for Attorney's
Fees in Connection with
the Interactive Video and
Data Service Proceeding

DECLARATORY RULING

Adopted: June 29, 1994; Released: July 11, 1994

By the Commission:

I. INTRODUCTION

1. In this declaratory ruling, we deny a request by William E. Zimsky, a communications lawyer, for a determination that he is entitled to attorney's fees in connection with his participation in the interactive video and data service (IVDS) proceeding (Gen. Docket No. 91-2). Zimsky claims that, because he filed a petition for reconsideration challenging the filing fee originally established for IVDS, he is entitled to between 20 and 30 percent of the money due to be refunded after we reduced the fee. His claim is based on the "common fund doctrine," which, when it applies, allows attorneys whose work product benefits a class of persons to claim a portion of funds produced by the attorneys' efforts as compensation for services. *See Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980).[1] We find that the Commission lacks authority to apply the common fund doctrine to determine that Zimsky is entitled to attorney's fees in this case.

II. BACKGROUND

2. On February 13, 1992, the FCC established a new radio service, known as the interactive video and data service (IVDS), to permit two-way interaction with commercial and educational programming, along with informational and data services. *Report and Order*, 7 FCC Rcd 1630 (1992). The Commission established a filing fee of $1,400 per applicant. *Id.* at 1639-40 ¶ ¶ 69-71. This fee reflected a decision by the FCC to require applicants to apply for a blanket license for a system that it assumed would include 40 cell transmitter stations (CTS), each with a separate call sign and a $35 filing fee. ($35 x 40 = $1,400) *See* 47 U.S.C. § 158(g); 47 C.F.R. § 1.1102(7) (fee schedule).

3. Subsequently, four parties -- not including Zimsky -- filed timely pleadings contending that the $1,400 filing fee was excessive. *Memorandum Opinion and Order*, 7 FCC Rcd 4923, 4924 ¶ 8 (1992). On August 4, 1992, the Commission denied those petitions and reaffirmed the use of a $1,400 filing fee. *Id.* at 4925 ¶ 15. At about the same time, the Commission began accepting applications for IVDS in nine of the top-ten service areas. Most, though not all, of the applicants tendered the $1,400 fee with their applications.

4. On September 3, 1992, Zimsky filed a petition for reconsideration of the Commission's August 4 *Memorandum Opinion and Order* on behalf of the Committee to Preserve Statutory Fees (CPSF), which consisted of certain applicants who did not file the $1,400 filing fee. Although Zimsky and the CPSF challenged the propriety of the fee, they did not ask the Commission to refund any of the fees already paid, because the CPSF members were not entitled to refunds.

5. On April 23, 1993, the Commission granted Zimsky's petition. While the Commission rejected the arguments that the filing fee was unconstitutional or lacking in statutory authority, it ultimately agreed with a third argument in the petition. *Second Memorandum Opinion and Order*, 8 FCC Rcd 2787, 2788 ¶ 10 (1993). The Commission held that it agreed with the contention that the requirement to file based on an assumed minimum number of 40 CTS stations could be an unnecessary burden on IVDS applicants. *Id.* Accordingly, the Commission permitted applications for a blanket license under one call sign and reduced the filing fee to $35 to reflect the single call sign. *Id.*

6. The Commission went on to state that any "IVDS applicants that paid an IVDS application fee based on the 40 CTS requirement shall be refunded the amount greater than the basic $35 per call sign fee." [Footnote omitted.] *Id.* at 2788-89 ¶ 11. As a result, 4,126 applicants were each due a refund of $1,365, for a total of $5,631,990. As already noted, none of the CPSF applicants represented by Zimsky are entitled to a refund.[2]

7. As the Commission was preparing to authorize certification of the refunds for payment, Zimsky sent a letter to the FCC's Managing Director claiming that he was entitled to a share of the refunds under the common fund doctrine. Letter from William E. Zimsky to Andrew S. Fishel (Jun. 11, 1993). Counsel for Zimsky then notified

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[1] The common fund doctrine provides that:

> . . . [A] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole . . . . The common-fund doctrine reflects the traditional practice in courts of equity. . . . The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense. . . . Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit. [Citations omitted.]

444 U.S. at 478.

[2] Because the CPSF applicants had not submitted the original $1,400 filing fee, their applications were dismissed and any partial fees submitted were returned. They thereupon appealed the dismissal of their applications. *Lavanway v. FCC*, No. 93-1337 (D.C. Cir., filed May 24, 1993). Eventually, the Commission agreed to reinstate the CPSF applications upon payment of the new $35 filing fee, and the CPSF applicants dismissed their appeal.

the Commission's Acting General Counsel to "identify a lien" and offer to meet with Commission staff. Letter from Jacob A. Stein to Rene Licht (Jun. 16, 1993). He later submitted a more extensive letter claiming 25 percent of the refunds under the common fund doctrine. Letter from Jacob A. Stein to Rene Licht (Jul. 19, 1993).

8. The Commission's Acting General Counsel responded that she disagreed that the common fund doctrine applied to this proceeding and that she would advise the FCC's Managing Director to issue full refunds to the applicants. Letter from Rene Licht to Jacob Stein (Sept. 30, 1993).

9. Zimsky then filed suit against the Commission in federal district court seeking an award of 25 percent of the refunds as attorney's fees. *Zimsky v. Hundt*,[3] No. 93-2175 (D.D.C., filed Oct. 22, 1993). As part of the lawsuit, the government stipulated that it would not authorize payment of the refunds during the pendency of the suit.

10. The District Court, at a status conference on January 6, 1994, stayed proceedings there to permit Zimsky to seek a final agency ruling on his fees petition, which ruling would be appealable to the United States Court of Appeals. Zimsky's motion for declaratory ruling followed on February 24, 1994.

III. MOTION FOR DECLARATORY RULING

11. Zimsky asks the Commission to make a "threshold determination" that he is entitled to some portion of the refunds under the common fund doctrine. He further requests that the Commission initiate an interpleader action under 28 U.S.C. § 1335 for a court to determine the amount of the refunds to which Zimsky is entitled, which Zimsky asserts is between 20 and 30 percent of the refunds.[4] Zimsky suggests that the court may appoint a guardian to represent the interests of the applicants entitled to refunds.

12. Zimsky contends that he is entitled to reimbursement under the common fund doctrine on the theory that his petition for reconsideration created a common fund which will benefit the applicants entitled to refunds. In this regard, he points out that the Commission did not grant the petitions for reconsideration originally challenging the filing fee. Zimsky argues that an award of attorney's fees to him under these circumstances comports with the equitable justification for the common fund doctrine because, otherwise, the applicants entitled to refunds would be unjustly enriched by his efforts challenging the filing fee.

13. Zimsky claims that the common fund doctrine applies because: (1) the beneficiaries can be identified; (2) the benefits (*i.e.*, the refunds) can be accurately traced; and (3) the fee can be shifted with exactitude by deducting a percentage of each refund check and paying it to Zimsky.

14. Although Zimsky acknowledges the Acting General Counsel's opinion that the Commission lacks the authority to make a common fund award, he nevertheless maintains that the Commission can make a "threshold determination" that he is entitled to attorney's fees. He also maintains, despite the Acting General Counsel's view, that the Commission may initiate an interpleader action for the purpose of obtaining an award for him.

IV. COMMENTS

15. The General Counsel afforded interested persons an opportunity to comment on Zimsky's motion. *Public Notice*, Mimeo No. 42103 (Mar. 11, 1994). The Commission received 19 comments and 281 reply comments, some on behalf of multiple applicants.[5] One of the commenting applicants indicated that he was willing to reimburse Zimsky. Kunkle Comments.[6] The rest of the commenters, representing over 400 applicants, opposed any payment to Zimsky.

16. Those commenters opposing Zimsky raised numerous objections to Zimsky's common fund theory. The three most significant arguments are the following: (1) the Commission lacks authority to make a common fund award or to take cognizance of Zimsky's claim; (2) the common fund doctrine does not apply to Commission rulemakings; and (3) the facts of this case are inconsistent with the equitable basis of the common fund doctrine.

V. ANALYSIS

17. Based on our review of Zimsky's motion and the comments, we find, as did the Acting General Counsel, no basis to make a determination that Zimsky is entitled to a common fund award or to initiate an interpleader action. In this regard, we agree with the principal objections raised by the commenters opposing Zimsky's motion. We now turn to a detailed examination of these objections and of Zimsky's responses.

A. COMMISSION AUTHORITY

18. *Opposing Comments.* Several commenters argue that there is no authority to award Zimsky attorney's fees in this proceeding. FRAC Comments at 7-10; ICC Comments at 6; North Pointe Comments at 4; Shadowfax Comments at 4-5; Coughlin Reply Comments at 3; North Pointe Reply Comments at 2. They point out that there is no statutory provision for awarding attorney's fees in this proceeding and that the Commission lacks equitable authority to award attorney's fees. They contend that the Commission must make full refunds to the applicants unless ordered to do otherwise by a court. They maintain that an interpleader action is unwarranted.

19. *Zimsky's Reply.* Zimsky refers to a memorandum of points and authority that addresses similar arguments that he made before the District Court. *Plaintiff's Memorandum of Points and Authorities in Support of Plaintiff's Opposition to Defendant's Motion to Dismiss or, in the Alternative, for*

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[3] The suit was originally filed as *Zimsky v. Quello*.

[4] The interpleader statute provides relief to stakeholders having custody of money or property to which there are two or more adverse claimants. By filing an interpleader, the stakeholder asks the court to determine its liability with respect to each of the adverse claimants. The stakeholder deposits the disputed amount in court for the court's judgment. *See also* Fed. R. Civ. P. 22. *See generally General Accident Group v. Gagliardi*, 593 F. Supp. 1080 (D. Conn.1984), *aff'd*, 767 F.2d 907 (2d Cir. 1985).

[5] These pleadings are listed in the Appendix to this ruling.

[6] A second applicant originally indicated that he was willing to pay but subsequently retracted his support. *Compare* Mercury Datanet Comments *with* Karl W. Hinkle (Mercury Datanet) Reply Comments.

Summary Judgment, filed in Case No. 93-2175 (D.D.C.) (Plaintiff's Memorandum). In this pleading he asserts that the common fund doctrine applies to administrative proceedings. *Id.* at 8. Although he concedes that the Commission lacks equitable power to award attorney's fees, he maintains that he nevertheless has a property interest in the fund that the Commission may recognize and bring before a court for enforcement. *Id.* at 4-5, 9-10, 12-14.

20. *Discussion.* We decline to make a "threshold determination" that Zimsky is entitled to attorney's fees. We disagree with Zimsky's assertions that he has an existing property interest in the refunds which we can recognize or that such an interest can arise in a purely administrative context. Our review of the precedents indicates that a common fund award can arise only in the context of litigation before an appropriate court exercising its equitable powers. The FCC, as an administrative agency, has no authority to make such an award. Indeed, the D.C. Circuit has explicitly held that the FCC lacks authority to award attorney's fees without statutory authorization. *Turner v. FCC*, 514 F.2d 1354, 1355 (D.C. Cir. 1975). Because no court has awarded Zimsky attorney's fees, we have no basis to take any action contrary to the applicants' right to receive full refunds.

21. It is clear from the case law that equitable jurisdiction in a court is essential to a common fund award. As the Supreme Court has said: "The common-fund doctrine reflects the traditional practice in courts of equity . . ." *Van Gemert*, 444 U.S. at 478. In this, the Court was referring to:

> . . . the power of federal courts in equity suits to allow counsel fees and other expenses entailed by the litigation not included in the ordinary taxable costs recognized by statute.
>
> . . . .
>
> Allowance of such costs in appropriate situations is part of the historic equity jurisdiction of the federal courts.

Sprague v. Ticonic National Bank, 307 U.S. 161, 164 (1939).

22. The requirement for equitable jurisdiction in a court led the Federal Circuit, in *Knight v. United States*, 982 F.2d 1573 (Fed. Cir. 1993), to reject a common fund claim based purely on administrative action, under circumstances strikingly similar to Zimsky's claim. In *Knight*, a law firm representing four employees of the Department of the Interior successfully petitioned the Department of the Interior and the Office of Personnel Management to revise the computation of cost of living allowances for federal employees who were removed from their positions. The firm claimed as attorney's fees 25 percent of back pay to be reimbursed as a result of the revised policy.

23. The court rejected the law firm's claim, stating:

> . . . a "common fund" is the creature of a *court's* inherent equitable power over funds under its control. A common fund does not crystallize at the moment a single plaintiff prevails on his claim. It is not created by the parties or their lawyers. A "common fund" is established by a court.
>
> . . . .
>
> [The government's obligation to honor a common fund] can only arise from litigation before a court, adequate representation of all parties in interest, identification of a common fund as to which the government is merely a stakeholder, jurisdiction over the fund by a court directly or through a party representing those being assessed, and exercise of the *judicial* equity power to impose liability on the fund -- none of which are present here.

982 F.2d at 1581-82. (Emphasis in the original.)

24. *Knight* indicates that, contrary to his claim, Zimsky, in the absence of any prior judicial action, has no existing "entitlement", "lien" or "property right" which the Commission can or should recognize. The Commission has the same obligation here, with respect to the applicants entitled to refunds, as the government in *Knight* had with respect to its employees: "Absent a court order recognizing the validity of [the attorney's claim] . . . the government was obligated to pay . . . the entirety of the amount it owed to each one. 982 F.2d at 1580.

25. Moreover, there is no basis for the Commission to initiate an interpleader. Interpleader is permitted where a stakeholder faces substantial claims exposing it to a real risk of multiple liability. *See General Accident Group v. Gagliardi*, 593 F. Supp. at 1086-87. Here, because we have no authority to make an award to Zimsky, an interpleader action would not be appropriate. As discussed above, there is no impediment to making full refunds to the applicants.

B. FURTHER ISSUES RELEVANT TO ZIMSKY'S MOTION

26. The preceding discussion disposes of Zimsky's request. However, the parties also discuss several additional issues that bear on Zimsky's request, and, for the sake of completeness, we wish to address those issues. First, we do not believe that a court would be justified in asserting jurisdiction over the funds in our custody. Second, we do not believe that application of the common fund doctrine applies to our rulemakings. Third, we believe that an award to Zimsky would be inequitable.

1. Court Jurisdiction

27. Ordinarily, jurisdiction over the question of attorney's fees is ancillary to jurisdiction over the subject matter of a suit. *See Sederquist v. Court*, 861 F.2d 554, 557 (9th Cir. 1988). Thus, attorney's fees may be awarded where litigation "has conferred a substantial benefit on members of an ascertainable class, and where *the court's jurisdiction over the subject matter of the suit* makes possible an award that will operate to spread the costs proportionately among them." *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 394 (1970), *cited in, Boeing Co. v. Van Gemert*, 444 U.S. at 478. (Emphasis added.) *See also Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 523 (1st Cir. 1991); *National Treasury Employees Union v. Nixon*, 521 F.2d 317, 320 (D.C. Cir. 1975) ("The award of attorney's fees is not a separate claim for relief requiring an independent jurisdictional base, but rather is an additional equitable remedy which under appropriate conditions can be awarded to the prevailing party"). *Accord, Washington Gas Light Co. v.*

Baker, 195 F.2d 29, 33 (D.C. Cir. 1951) (court has equitable power to award attorney's fees from funds under its control during a suit).

28. In his pleadings before the District Court, Zimsky argued that an action for attorney's fees could be brought independently of a suit on the merits, a contention rejected by the court in *Sederquist.* Plaintiff's Memorandum at 4-5, 8-9. The cases he cites, however, such as *Lafferty v. Humphrey,* 248 F.2d 82 (D.C. Cir. 1957), *cert. denied,* 355 U.S. 869 (1957), were not in fact independent, but arose from related suits on the merits. *See Clackamas County, Oregon v. McKay,* 219 F.2d 479 (D.C. Cir. 1954). *See also National Council of Community Mental Health Centers v. Mathews,* 546 F.2d 1003, 1008 (D.C. Cir. 1976), *cert. denied,* 431 "U.S. 954 (1977) (explaining *Lafferty).*[7] Moreover, the Supreme "Court has cautioned that requests for attorney's fees should not result in a second major litigation. *Hensley v. Eckerhardt,* 461 U.S. 424, 437 (1983). This would necessarily be the result where, as here, a litigant brought an independent suit for attorney's fees after participating before a forum that had no power to award such fees.

2. Applicability of the Common Fund Doctrine to Rulemakings

29. *Opposing Comments.* The commenters assert that the common fund doctrine does not apply to rulemakings, such as this one. Coalition Comments at 2-3; North Pointe Comments at 3-5; Coughlin Reply Comments at 3; FRAC Reply Comments at 2. They assert that the common fund doctrine was intended to recognize instances in which a party prosecuted litigation to vindicate the private rights of a class of beneficiaries. According to these commenters, Zimsky's participation in this rulemaking does not fall within that rationale because the rulemaking was directed to making a policy decision in the public interest and not to vindicating private rights. In their view, the creation of the refunds was purely incidental to the public interest function of the rulemaking.

30. *Zimsky's Reply.* Zimsky denies that the relevant action here should be considered a rulemaking. He contends that the order which created the refunds should be characterized as an adjudication. Plaintiff's Memorandum at 10.

31. *Discussion.* In our view, the common fund doctrine does not apply to our rulemakings. Adjudications and rulemakings have fundamentally different characters. Adjudications are concerned with the determination of past and present rights and liabilities. *New Orleans Public Service, Inc. v. Council of the City of New Orleans,* 491 U.S. 350, 370-71 (1989). *See also Attorney General's Manual on the Administrative Procedure Act* at 14. Rulemaking, on the other hand, is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations. *Id.* In making such policy decisions, such as the appropriate IVDS filing fee, the Commission expects to receive and assimilate public comment representing diverse stakes in making its public interest determinations. Under these circumstances, there is no justification for considering a particular participant as entitled to special reimbursement.[8] We are concerned that application of the common fund doctrine to Commission rulemakings would simply burden those proceedings with questions of whether a party's position in the rulemaking established a compensable claim. Indeed, as some commenters suggest, it might encourage participation in rulemakings by speculators hoping to claim attorney's fees.

32. We reject Zimsky's assertion that the order mandating refunds should be considered adjudicatory and thus distinct from the rulemaking. Zimsky's petition sought reconsideration of an action revising the Commission's rules to establish a filing fee for IVDS. The refund of fees already collected was purely incidental to the eventual modification of the rule. Zimsky's petition did not seek refunds, as his clients, who did not submit the $1,400 filing fee, were not entitled to any. Indeed, if Zimsky had sought reconsideration of the original action which instituted the $1,400 fee (instead of the order reaffirming the fee) there would have been no refunds, because the Commission would not yet have collected any fees.

3. The Equities of this Case

33. *Opposing Comments.* Numerous commenters contend that a common fund award to Zimsky would be inequitable. Advance MobilComm Comments at 1; Been Comments at 1-2; Chinese American Comments at 1; FRAC Comments at 5-7, 10-13; Holt Comments at 1; ICC Comments at 3-7; InterVision Comments at 1; Coalition Comments at 6-10; Kumari Comments at 1-2; Magnolia Comments at 1; Shadowfax Comments at 5-9; Sharma Comments at 1-2; Ashu Vashisht Comments at 1-2; Naresh

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[7] The only case that Zimsky cites in which a court -- not itself having decided the merits of a case -- found an administrative agency liable to pay attorney's fees under the common fund doctrine is an intermediate state court case, *Taylor v. State Universities Retirement System,* 560 N.E.2d 893 (Ill. App. 1990). There, the court overturned the denial of attorney's fees by the Illinois State University Retirement System (SURS) to an attorney who had obtained disability benefits for his client from which SURS was able to recoup payments it made to the client. The court's holding rests on legal principles inapplicable here. The ruling that SURS could be required to pay attorney's fees is directly contrary to federal law discussed at paragraph 21, *supra.* Moreover, SURS's obligation to make a common fund award arose because it was a beneficiary of the attorney's efforts in the same position as a private insuror, not -- as is the FCC -- a stakeholder.

[8] The D.C. Circuit has held that:

> One who is influential in litigation leading to the announcement of a rule of law does not thereby gain a right of compensation from all those who benefit from the application of the rule.
>
> . . . .
>
> The assertion of a noncontractual claim for compensation for services rendered in sponsoring favorable legislation does not deserve prolonged discussion.

Whittier v. Emmet, 281 F.2d 24, 32 (D.C. Cir. 1960), *cert. denied,* 364 U.S. 935 (1961). Zimsky cites no case in which the common fund doctrine has been applied to a rulemaking proceeding. Indeed, one of his cases, *Best v. California Apprenticeship Council,* 193 Ca. App.3d 1448, 1456 (1987), indicates that the doctrine does not apply to quasi-legislative proceedings.

Vashisht Comments at 1-2; Vintage Comments at 1; Alliance Reply Comments at 2-4; Coughlin Reply comments at 1-4; FRAC Reply Comments at 2-3; ICC Reply Comments at 2-4; ITV Reply Comments at 2-4; North Pointe Reply Comments at 2-3; Osborn Reply Comments at 1, attachment.[9] They urge that Zimsky did not represent them and that his actions did not benefit them.[10] They observe that, unlike Zimsky's clients, they did not dispute the validity of the original $1,400 filing fee, which they suggest had the beneficial effect of discouraging the filing of speculative applications. *E.g.*, Coalition Comments at 6-8; Shadowfax Comments at 6-8. They argue that the applicants entitled to refunds and Zimsky's clients constitute two distinct and adverse classes. *Id.* According to these commenters, Zimsky's clients benefited by being reinstated, while the applicants entitled to refunds were harmed by increased competition and delay caused by Zimsky's efforts. Additionally, they argue that in view of the limited nature of Zimsky's participation -- the filing of a single petition for reconsideration -- the award claimed by Zimsky represents an unjustifiable windfall rather than reasonable reimbursement.

34. *Zimsky's Reply.* Zimsky responds that the applicants have no cause to oppose his request for attorney's fees. Zimsky Reply Comments at 2-4. In his view, what is relevant is that he prosecuted a meritorious action resulting in the creation of a fund and therefore has a claim for attorney's fees against the fund. Zimsky attributes the applicants' opposition to his claim to their interest in receiving the full amount of the refunds. Because of the applicants' "intransigence," Zimsky submits that a neutral third party should resolve his claim.

35. *Discussion.* We disagree with Zimsky's contention that awarding him attorney's fees is necessary to prevent the unjust enrichment of the applicants entitled to refunds. On the contrary, we agree with the commenters that an award of attorney's fees would unjustly enrich Zimsky. First, Zimsky has not shown that it would be equitable to treat him as having represented the applicants entitled to refunds. Second, an award of the magnitude sought by Zimsky would be an unreasonable windfall.

36. In our view, it would be inequitable to award Zimsky attorney's fees from the refunds unless, as a matter of equity, he filed his petition for reconsideration on behalf of the applicants entitled to refunds. This follows from the relation of the common fund doctrine to the theory of quantum meruit.[11] *See Silberman v. Bogle,* 683 F.2d 62, 64 (3rd Cir. 1982). Recovery under a theory of quantum meruit requires that services were accepted and enjoyed by the person sought to be charged under circumstances that provided reasonable notice that the person furnishing the services expected, in so doing, to be paid. *See In re San Juan DuPont Plaza Hotel Fire Litigation,* 768 F. Supp. 912, 924 n.43.

37. Courts have applied the common fund doctrine consistent with this principle. Thus, the Supreme Court noted in a case where claims were filed which benefited creditors that: "they had notice by the bill, that suit was brought not exclusively for the benefit of the complainants therein, but equally for those of the same class who should come in and contribute to the expenses of the litigation." *Central Railroad & Banking Co. of Georgia v. Pettus,* 113 U.S. 116, 126-27 (1885). Here, Zimsky makes no claim that he formally sought to represent the applicants entitled to refunds.

38. In a case in which the party seeking a common fund award did not sue in a formal, representative capacity,[12] the court explained the equitable considerations that apply in such a case:

> Whether one professes to sue representatively or formally makes a fund available for others may, of course, be a relevant circumstance in making the fund liable for his costs in producing it. But when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation -- the absence of an avowed class suit . . . hardly touch the power of equity in doing justice as between a party and the beneficiaries of the litigation. . . . And so, [the relation of the party and the beneficiaries of the litigation] must enter into the ultimate judgment of the District Court as to the fairness of making an award, or the extent of such award . . . . In any event such allowances are appropriate only in exceptional cases and only for dominating reasons of justice.

Sprague v. Ticonic National Bank, 307 U.S. at 167. We do not read the court to say, as Zimsky would have it, that any time a party's litigation incidently benefits others, a common fund award is appropriate. Rather, we understand the court to mean that -- in the absence of formal representation -- a common fund award would be appropriate only when the relationship between the litigant and the beneficiaries raises strong equities for treating the litigant as acting for the benefit of the others. We consider this entirely consistent with our understanding of the principles of quantum meruit, as described above -- which require fair notice to the beneficiaries that services are being rendered on their behalf.

39. We see nothing in the circumstances in which Zimsky filed his petition for reconsideration that would have put the applicants on notice that he was acting on their behalf. Nothing in his petition indicates that he was

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[9] Numerous other reply comments also took this position. They assert that they were satisfied with the $1,400 fee, that Zimsky did not represent them, and that Zimsky's efforts have been to the detriment of the applicants entitled refunds and to the IVDS industry.

[10] One commenter accuses Zimsky of engaging in "greenmail." FRAC Comments at 3-5.

[11] The expression quantum meruit means "as much as he deserves." Under this doctrine, a person who benefits from the labor and materials of another should not be unjustly enriched. Rather, the law implies a promise to pay a reasonable amount for the labor and materials furnished, even in the absence of a specific contract. *See In re San Juan Dupont Plaza Hotel Fire Litigation,* 768 F. Supp. 912, 924 n.43 (D. Puerto Rico 1991).

[12] In that case, a party, as the beneficiary of a trust fund, brought an action against banks in receivership to establish a lien against the banks' assets. As a consequence of *stare decisis,* the party's claim necessarily established the claims of other, similarly situated, beneficiaries of the trust fund. The court did not rule on whether a common fund award should be made in that case, but held that a District Court erred in refusing even to entertain a petition for an award of attorney's fees.

acting other than for his clients.[13] As the commenters point out, there is no reason to believe that those applicants who did not dispute the validity of the $1,400 filing fee supported Zimsky's attempt to seek reconsideration or considered his efforts beneficial. Indeed, as the commenters also point out, Zimsky's clients, who refused to pay the $1,400 filing fee represent a class distinct from those who did pay, and the interests of the two groups may be adverse. In short, we find it equitable to treat Zimsky's petition for reconsideration as having been filed only for the benefit of his own clients.[14]

40. As an additional matter, we do not believe that Zimsky has demonstrated that his claim of 20-30 percent of the refunds -- between $1,126,398 and $1,689,597 -- represents a reasonable attorney's fee, as required under the common fund doctrine. *See Boeing Co. v. Van Gemert*, 444 U.S. at 478; *Swedish Hospital Corp. v. Shalala*, 1 F.3d 1261, 1265 (D.C. Cir. 1993). *See also In re THC Financial Corp. Litigation*, 86 F.R.D. 721, 738 (D. Hawaii 1980) (the reality and appearance of windfall fees should be avoided).[15]

41. Zimsky's principle argument for claiming 20-30 percent of the refunds is that such a figure is typical of common fund awards in class action suits. *See Swedish Hospital*, 1 F.3d at 1272. Here, however, Zimsky's limited participation in the IVDS proceeding is so obviously different from full-blown class action litigation that this precedent provides no guidance as to the reasonableness of his claim.[16] *Compare Trustees v. Greenough*, 105 U.S. 527, 532 (1882) (common fund award made to compensate party pursuing litigation benefiting others "at great expense and trouble"). Although Zimsky goes to some lengths to document the labor and expertise he applied in preparing his petition for reconsideration, we agree with the commenters that these seem no different from those represented by pleadings typically filed on behalf of specific clients in proceedings such as the IVDS rulemaking. *Compare Cosgrove v. Sullivan*, 759 F. Supp. 166, 167 (S.D.N.Y. 1991) (attorney's fees reflect "the extremely high quality of legal services rendered").

42. In view of the foregoing, we conclude that we have no authority to find that Zimsky is entitled to attorney's fees for his participation in the IVDS proceeding. We therefore find no basis to initiate an interpleader action or to withhold full refunds from the IVDS applicants (except as may be appropriate in light of the pendency of judicial proceedings involving this issue).

VI. ORDER

43. ACCORDINGLY, IT IS ORDERED, That the Motion for Declaratory Ruling, filed February 24, 1994, by William E. Zimsky IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

The following comments were received:

1. Advanced MobileComm, Inc.
2. Quentin L. Breen (2 applicants)
3. Chinese American Investment Group Partnership
4. Fee Refund Action Committee (FRAC)
(74 applicants)
5. Florida MIVS Corp.
6. Phillip C. Holt
7. Independent Cellular Consultants (ICC)
(not an applicant)
8. InterVision United Partnership and
InterVision Two
9. IVDS Applicants Coalition (Coalition)
(43 applicants)
10. Ramesh Kumari
11. Donald J. Kunkle
12. Magnolia Communications
13. Mercury Datanet
14. North Pointe Development Corporation *et al.*
(5 applicants)
15. Shadowfax Cellular Partnership *et al.*
(27 applicants)

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[13] *See also* paragraph 33, *supra*.

[14] *See American Association of Marriage and Family Counselors, Inc. v. Brown*, 593 F.2d 1365, 1368-69 (D.C. Cir. 1978) (no common fund award where attorney's clients were the primary beneficiaries of litigation and fully capable of bearing the costs, and where the interests of the clients were not "reasonably close" to the interests of the alleged beneficiaries). *Accord, Jett v. Merchants and Planters Bank*, 228 F.2d 156, 158 (4th Cir. 1955) (no compelling equities for shifting attorney's fees where the attorney's efforts were directed to securing his own client's claims and others benefited incidently).

[15] Courts have found it relevant that class members support the reasonableness a fee determination. *See Swedish Hospital*, 1 F.3d at 1272. The commenters report that Zimsky attempted to solicit support for his proposal and supplied draft comments for them to submit. *See* ICC Comments, Appendix A, B. Only one applicant endorsed Zimsky's draft comments, while over 400 joined in comments opposing Zimsky.

[16] For example, in *Swedish Hospital*, where the court found an award of $2,000,000 (20 percent of the fund) reasonable, the attorney's lodestar (hours reasonably spent times reasonable hourly rate) was approximately $619,000. 1 F.3d at 1263-64, 1272. Similarly, in *Bebchick v. Washington Metropolitan Area Transit Commission*, 805 F.2d 396, 403-07 (D.C. Cir. 1986), the court approved an award of $1,675,000 (25 percent of the fund), where the lodestar was $953,480 (based on 6,053 billable hours). Here, Zimsky has not attempted to establish his lodestar. However, the commenters suggest that a fee of $10,000-$20,000 would be more than generous for preparing Zimsky's petition for reconsideration, making Zimsky's claim, at minimum, 56 to 169 times his lodestar. FRAC Comments at 13; Shadowfax Comments at 9. Accordingly, regardless of whether a percentage-of-the-fund approach is generally appropriate, the apparent disparity between the amount of Zimsky's claim and the customary fee raises serious questions of whether it would be reasonable here.

16. Romesh K. Sharma
17. Ashu Vashisht
18. Naresh K. Vashisht
19. Vintage Communications

The following reply commments were received:[17]

1. A.G. Allebach, Inc.
2. Marlene Abe
3. Leslie L. Alexander
4. American IVD Communications
5. Robert Ancha and Ed Van Drunen
6. Annie B. Evans Irrevocable Trust G
7. Anza Communications
8. Anza Communications III
9. Applicants' Alliance for Licensing Fairness (Alliance) (4 applicants)
10. James Anning
11. Garrett H. Arizala
12. Gary H. Arizala
13. Kyle Hitoshi Arizala
14. Avanti Communications
15. Avanti Communications III
16. Ax Information Services
17. Harvey Babbitt
18. Diana M. Bailey
19. John V. Bailliet
20. Ball & Jacobi
21. Belle M. Beem Trust
22. Robert Bitton
23. Murray L. Black
24. Tom Blady
25. Block Television Incorporated
26. Jeffrey M. Blunt
27. Carl L. Boschult, M.D.
28. Paul D. Boschult
29. Art Boroughs
30. Harold L. Brake
31. Rosita Brandwyn
32. Hayo Broers
33. C&L TV Partnership
34. Robert R. Cak
35. David E. Carlson
36. John M. Carlson, Jr.
37. Roger L. Carpenter
38. James P. Cate
39. Kent Charugundla
40. Derwood Sumner Chase, III *et al.*
41. Abbas A. Chothia
42. Ed Christie
43. John T. Clarno
44. Dr. Fred A. Clifton
45. Laura Coffey
46. Alden L. Coke
47. Collin Plano General Partnership
48. Eugene R. Connor
49. Corcil Industries
50. The Coughlin Group
51. Carolyn A. Crane
52. Walter W. Cruttenden
53. Lori Czapinski
54. D.A.B.B. Partners
55. Sandra H. Darling
56. DCRM Partners
57. James L. De Guehery
58. Ann G. Deveny
59. Hugh O. Deweese
60. Neal S. Dixon
61. Dolphin Industries
62. James N. Doolittle
63. Susan M. Downing
64. Thomas T. Dunbar
65. Edward D. McDade Revocable Trust
66. Edward W. Norris Limited Partnership
67. Gregory A. Ekbom
68. Ellis Communications
69. Enakee Partnership
70. Margaretha K. Enderle
71. Robert S. Erwin
72. Essex Family Trust
73. Family Alliance
74. Federal IVD
75. Fee Refund Action Committee
76. Leland E. Finley
77. Jerome M. Fisher
78. Fortuna Communications
79. Forrest Freid

[17] Some of the reply comments were late-filed. However, consideration of these brief pleadings will not be disruptive, and they are accepted. Accordingly, the Motion for Extension of Time, filed March 31, 1994, by Independent Cellular Consultants is dismissed as moot.

80. Garland Partners
81. Marguerite Geckler
82. GFTV Partners
83. John T.R. Gillespie
84. Stephen L. Gimbert
85. Wesley L. Gingrich
86. Norman Gorlatz
87. Jan B. Green
88. Jay R. Greider, Jr.
89. Michael J. Gunning
90. Mark D. Hafermann
91. Richard A. Halpern
92. David V. Harmsen
93. Timothy P. Hartley
94. Everett Hartman
95. Jeanne U. Hartman
96. John W. Havranek
97. Hersperger, Sellers, Preisler & Lynn Partnership
98. Karl W. Hinkle (Mercury Datanet)
99. Nathan E. Hodges
100. Troy Hodges
101. Robert T. Hollingsworth, Jr.
102. Rene Horwick
103. The Hoseck Corporation
104. Adrian O. Hubbell
105. Independent Cellular Consultants
106. InteracTiVision, Inc.
107. Interactive Frequencies Partnership
108. Interactive Video Investments, Inc.
109. Roland N. Icke
110. ITV, Inc.
111. IVDS Systems
112. Roy L. Jacobs
113. Marjorie H. Jantzen
114. Jermiah Chavoen Limited Partnership
115. Wayne C. Johnson
116. Patricia J. Jordan
117. John J. Carney, Joseph D. Carney, John Mineo & Associates
118. JRV Partnership
119. Darrell Kammer
120. Kala and Leka Karn Partnership
121. Peter Karis
122. Ernest N. Kaye
123. L.C. Kellum
124. Robert E. Kellum
125. Marguerite Keuchkerian
126. Frank B. Kimball
127. Cecil W. King, Sr.
128. Marie S. Kippels
129. Koller Chemical Partners
130. Alois J. Kosch
131. Raveesh K. Kumra
132. Kuravilla Kurien
133. Mani A. Kurien
134. Sosa Kurien
135. Laguardia Partnership
136. Laura Lapa
137. Paul Lapa
138. J.F. Lapinski & Associates
139. William L. Larson
140. Robert Larsell
141. Laubheim Partnership
142. James Lawrence III
143. Wayne Lebsack
144. Leon M. Le Faivre
145. Michael Le Faivre
146. Jon T. Leffingwell
147. T.J. Leffingwell
148. Liberty Communications Partnership
149. Warren T. Linney
150. Joe D. Long
151. Ronald H. Little
152. Walter Lowman
153. Lyon Communications
154. Lyon Communications III
155. Robert Lyons
156. M&J Partners
157. Maxon Partners
158. Susan D. McCall and Kim A. Kitzke
159. John McLaren
160. Media Data Partners
161. Charles M. Michel
162. Mario Meola
163. Patricia Meola
164. Al Minkoff
165. William W. Moake
166. Edmund J. Mooney
167. John Montfort
168. Marshall L. Morgan
169. William G. Morgan
170. Philip M. Morris
171. MRD Partnership
172. David J. Myers
173. David Nagradsky

174. Nagrodsky Partnership (5 applicants)[18]
175. Namaqua Limited Partnership
176. National Interactive Services
177. National IVD Organization
178. Nationwide Communications
179. Felix and Maria T. Norat
180. North Pointe Development Corporation *et al.*
181. Charles L. Nyman
182. Leland O. Nyman
183. James J. O Connell
184. John A. Ohlsson
185. George Onaga
186. Steven K. Osborn
187. James E. Oxner
188. P&P Investments
189. Thomas L. Pedersen
190. J. Allen Petersen
191. Dale L. Phillips
192. Kai H. Pihl
193. Emma M. Pinkston
194. Sidney E. Pinkston
195. H. George Pires
196. James W. Popa
197. Wanda Preisler
198. Primrose Partners Limited Partnership
199. Progressive Communications, Inc.
200. Denis A. Radefeld
201. Jeffrey K. Ramsey
202. Jill D. Ramsey
203. Kelly G. Ramsey
204. Kenneth L. Ramsey
205. Scott Ramsey
206. Reading Broadcasting, Inc.
207. John R. Redmond
208. Robin C.A. Rice
209. Tracy R. Richardson
210. Richardson Family Trust
211. Audrey Rietveld
212. Roam Dublin Television
213. M.K. Robbs
214. Stanley B. Roberson
215. Dean M. Rockey
216. Romulus Telecommunications, Inc.
217. Ronald L. Kushner Limited Partnership
218. James M. Ronning
219. Sharron Roth
220. Jill Rozeboom
221. Loren C. Rozeboom
222. RRS Partners
223. Gloria M. Ruggles
224. Jerry E. Ryan
225. H. Carl Ryberg
226. S&W Associates
227. Alice Sage-Pulver
228. Leo J. Santucci
229. Douglas J. Schneider
230. James J. Schneider
231. Mark W. Scott
232. Gary Scholten
233. Samuel Schwartz
234. Robert L. Seaman
235. Ronald C. Sheff
236. Gary T. Shelford
237. John Sheppard
238. Sierra Land Group, Inc.
239. Michael I. Sigesmund
240. John I. Simmons
241. Cody L. Smith
242. Anton Smutko
243. Samuel J. Smyth
244. David G. Stanley, M.D.
245. Robert T. Steller
246. Andrew C. Stenhouse, M.D.
247. Michael E. Suenram
248. K.P. Sukumaran
249. Sunset Estates Ltd.
250. David F. Swain
251. E. Michael Thomas Jr.
252. Thomas J. Reese III Partnership
253. Dewey H. Thornton.
254. Randy Toyoshima
255. TV Programs
256. Michael A. Truppo
257. Sharon Turner
258. Karla Vallance
259. S.A. Vallance
260. Peter J. Vaglica
261. Van A Partnership

[18] Reply comments were received from Allison Ehrling, George Nagrodsky, Sr., George D. Nagrodsky, Jill Nagrodsky, and Richard Nagrodsky.

262. J. Spencer Van Alsburg
263. Edward Van Drunen
264. Vista IVDS Partners
265. Gary Vlahovich
266. Darla J. Warner
267. Lincoln A. Warrell
268. Curt A. Weiland
269. William M. Wendell
270. Wildflower Ltd.
271. Joseph W. Wimsatt
272. David L. Williams
273. Greg Winters
274. Albert C. Worner
275. Wunschel Law Firm, P.C.
276. Yankee IVDS Partnership
277. Frank M. Yerger
278. Luke E. Yip
279. William E. Zimsky
280. Gary R. Zipper
281. Roberta Zipper

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 17, 1994

COMMISSION SEEKS COMMENT ON REQUESTS OF FEDERAL AGENCIES AND OTHERS FOR THE ASSIGNMENT OF N11 CODES IAD File No. 94-101

Comments Due: August 19, 1994
Reply Comments Due: September 23, 1994

In a petition filed March 11, 1994, the General Services Administration (GSA) asks the Commission to assign an N11 service code for use by the public to gain access to federal executive agencies. This request is similar to a request received last year that such a code be assigned for access to state governments. (*See* National Association of State Telecommunications Directors, *Ex Parte Presentation in CC Docket No. 92-105*, September 22, 1993).

In the May 1992 Notice of Proposed Rulemaking in CC Docket No. 92-105, 7 FCC Rcd 3004, the Commission tentatively concluded that N11 codes should be made available for abbreviated dialing. The Commission opened that docket following receipt of a petition for declaratory ruling filed by BellSouth Corporation. BellSouth asked the Commission to declare that the assignment of such numbers for access to "local pay per call type information services" would be consistent with the Communications Act and Commission policies.

Subsequently, in October 1993, The National Center for Law and Deafness and Telecommunications for the Deaf, Inc. filed a joint petition asking the Commission to direct assignment or reservation of a uniform nationwide N11 number (*e.g.* 711) to facilitate access by individuals with hearing and speech disabilities and other text telephone users to telecommunications relay services (TRS). The joint petition also requested assignment or reservation of a second unspecified N11 number for TRS access by voice telephone users. The Commission sought and received comments on the use of N11 codes for such TRS services. (*See* Commission clarifies Pleading Cycle for Comments, Public Notice, IAD File No. 93-02 (October 28, 1993)). We now invite comment on the request of the state telecommunications directors and on the petition from GSA.

Requests to use N11 codes for TRS access and for access to government agencies were not received until after the close of the pleading cycle following release of the NPRM in CC Docket 92-105. In light of the many requested uses for the limited number of N11 codes available, we again seek general comments on the best use for N11 codes and other abbreviated dialing arrangements.

Initial comments should be filed on or before **August 19, 1994** and reply comments should be filed on or before **September 23, 1994**. All comments should be filed with the office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comment captions should include the Industry Analysis Division (IAD) file number shown above. The petition from GSA, the request from the state telecommunications directors, and comments previously received on related issues are available for inspection and duplication between the hours of 9:00 a.m. and 4:00 p.m. in the Public Reference Room of the Common Carrier Bureau's Industry Analysis Division, located at 1250 23rd Street, N.W., Plaza Level, Washington, D.C. Copies may also be obtained from International Transcription Service by calling (202) 857-3800.

For further information, contact Mary Green, Industry Analysis Division, (202) 632-1363

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
June 27, 1994

Released: June 29, 1994

Storer Cable TV of Connecticut, Inc.
c/o Mr. Leonard J. Kennedy, Esq.
Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Washington, D.C. 20037

Dear Mr. Kennedy:

This letter is in response to identical requests by Storer Cable TV of Connecticut, Inc. ("Storer") and Pegasus Cable Television of Connecticut, L.P. ("Pegasus"), received May 23, 1994, that the Commission clarify or waive its regulations to approve a mutual agreement between Storer and its local franchising authority, the State of Connecticut Department of Public Utility Control ("DPUC"). The cable operators state that the terms of the separate agreements call for the operators' consent to extension of their respective potential refund liabilities back to September 1, 1993, if the DPUC is unable to issue by September 1, 1994 a local rate order governing the cable operators' initial rates for regulated basic cable service and associated equipment. The cable operators state that, provided the Commission approves, the parties intend to agree on a timetable for completion of the operators' respective rate proceedings by the DPUC no later than either October 1 or November 30, 1994. In a letter dated May 26, 1994, the DPUC endorsed the operators' requests as being in the best interests of subscribers and all interested parties.

This letter confirms our understanding of the agreements reached between Storer, Pegasus and the DPUC during a telephone conversation held on June 13, 1994. The cable operators agreed to extension of their refund liability back to September 1, 1993, provided that the DPUC concludes the respective rate proceedings by November 30, 1994. We consent to this arrangement because it appears that the arrangement serves to further protect subscribers' interests in potential refunds. We strongly encourage full cooperation among the parties in order that subscribers may receive the benefits of cable service rate regulation as soon as possible.

Sincerely,

Meredith J. Jones
Chief, Cable Services Bureau

CC:
Howard L. Slater, Esq.
Murtha, Cullina, Richter & Pinney
City Place 1
185 Asylum Street
Hartford, CT 06103-3469

James A. Koerner
Baraff, Koerner, Olender & Hochberg
5335 Wisconsin Avenue, N.W.
Suite 300
Washington, D.C. 20015-2003

Ms. Heather F. Hunt
Commissioner, State of Connecticut Dept. of Public Utility Control
1 Central Park Plaza
New Britain, CT 06051

Tom Nathan
Comcast Corporation
1500 Market Street
35th Floor
Philadelphia, PA 19102

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TLC PRODUCTIONS, INC.
d/b/a NORTH MIAMI
INTERNATIONAL TELEPORT

File No. I-T-C-94-210

Application for authority pursuant to Section 214 of the Communications Act of 1934, as amended, to establish channels of communications between the United States and various international points via INTELSAT and various separate satellite systems for the provision of international data, voice and video services

ORDER AND AUTHORIZATION

Adopted: June 1, 1994; Released: July 11, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application requesting authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to establish channels of communications between the U.S. and various international points for the provision of international voice, data and video services, we find that the present and future public convenience and necessity will be served by its grant.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-210 IS GRANTED and TLC Productions, Inc. (TLC) is authorized to:

a. lease from Comsat and operate satellite circuits to each point listed in Attachment A between appropriately licensed U.S. earth stations and appropriate INTELSAT satellites over the Atlantic and Pacific Oceans, connecting with similar circuits between the satellite and earth stations in the countries listed in Attachment A hereto furnished by TLC's correspondents in those countries for the provision of switched and private line services;

b. lease from PanAmSat (PAS) and operate the satellite circuits specified in Attachment B between appropriately licensed earth stations in the United States and the PAS-1 satellite connecting with similar circuits between the satellite and earth stations in the countries listed in Attachment B furnished by TLC's correspondents in those countries;

c. lease and operate facilities in the U.S. earth stations authorized to communicate with the PAS-1 satellite;

d. lease and operate necessary domestic connecting facilities;

e. use the facilities set forth in b, c, and d above to provide private line services not interconnected with the public switched networks (10 64-kbps circuits to each location and a total of four 36-MHz circuits for all locations) and switched services interconnected with the public switched networks (six 64-kbps circuits to each location) between the U.S. and the countries listed Attachment B subject to any restrictions set forth in this or any other Commission Order involving separate international satellite systems;[1]

f. lease from Columbia and operate the satellite circuits specified in Attachment C between appropriately licensed earth stations in the United States and the TDRSS satellites located at 41^0 E.L. and 174^0 E.L. connecting with similar circuits between the satellites and earth stations in the countries listed in Attachment C furnished by TLC's correspondents;

g. lease and operate facilities in the U.S. earth stations authorized to communicate with the TDRSS satellites;

h. lease and operate necessary domestic connecting facilities; and

i. use the facilities set forth in f, g, and h above to provide private line services not interconnected with the public switched networks (five 64-kbps circuits to each location and a total of four 36-MHz circuits for all locations)[2] and switched services interconnected with the public switched networks (five 64-kbps circuits to each location) between the U.S. and the countries listed Attachment C subject to any restrictions set forth in this or any other Commission Order involving separate international satellite systems.

3. IT IS FURTHER ORDERED that our authorization of TLC to provide private lines as part of the services authorized herein is limited to the provision of such private lines only between the United States and the points

[1] Although TLC requested authority for 24 64-kbps circuits to each location for the provision of services interconnected with the public switched network, we do not believe that the request is reasonable given the number of countries requested and the limited number of circuits (1,250 64-kbps circuits) available over the PAS-1 satellite for switched services. Similarly, we find unreasonable TLC's request for two (2) 36-MHz circuits to each location for the provision of video services via the PAS-1 and TDRSS satellites because the request exceeds the capacity of the satellites. Accordingly, we have authorized a total of four 36-MHz circuits per satellite which may be use to any of the authorized points in accordance with TLC's service requirements. Should TLC's service requirements exceed the number of circuits authorized herein, TLC may file a separate Section 214 application.

[2] See discussion in footnote 1, *infra* with respect to the number of 36-MHz circuits requested.

listed in Attachments A, B and C – that is, private lines which originate in the United States and terminate in the points listed in Attachments A, B and C or which originate in the points listed in Attachments A, B and C and terminate in the United States. In addition, TLC may not – and its tariff must state that its customers may not – connect private lines provided over these facilities to the public switched network at either the U.S. end or the points listed in Attachments A, B and C or both, for the provision of international basis telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the points listed in Attachment A, B and C afford resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), *petitions for reconsideration pending*.

4. IT IS FURTHER ORDERED that neither TLC nor any persons or companies directly or indirectly controlling or controlled by TLC, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which TLC or any persons or companies controlling or controlled by TLC are parties.

5. IT IS FURTHER ORDERED that TLC's request to provide service via the Statsionar 4 satellite system IS DEFERRED.[3]

6. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreements, including the applicable accounting rate, it enters into with its foreign correspondents with the Commission within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

7. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

8. IT IS FURTHER ORDERED that the applicant shall file annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

9. IT IS FURTHER ORDERED that the applicant shall file a semi-annual circuit report pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. § 63.15(b), for circuits provided over the INTELSAT system.

10. IT IS FURTHER ORDERED that the applicant shall file a separate Section 214 application for the use of any additional circuits it wishes to operate via the PAS-1 satellite.[4]

11. IT IS FURTHER ORDERED that the number of circuits authorized herein for the provision of services via separate satellite systems is subject to limitations on the number of circuits specified under the separate systems policy and applicable consultations under Article XIV(d) of the INTELSAT Agreement.[5]

12. This order is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

[3] Columbia Communications Corporation has filed a petition for declaratory ruling and numerous petitions to deny pending applications that seek to provide service between the U.S. and the Russian Federation and other countries comprising the former Soviet Union via Russian satellites. Columbia is concerned that it has not been able to negotiate an operating agreement for its system. Because of the foreign policy concerns raised by Columbia's filings, the Commission has sought the views of the Executive Branch on this issue.

[4] Given the capacity limitations of the PAS-1 and TDRSS satellites, it would be impractical to authorize two 36-MHz circuits to each location. Accordingly, we will permit TLC to use the four 36-MHz circuits authorized herein for the PAS-1 and TDRSS satellites to any of the authorized locations in accordance with its service requirements. Any request for additional circuits in excess of the cumulative total of four 36-MHz circuits per satellite authorized herein will require the filing of a separate Section 214 application.

[5] We note that TLC has requested authority to serve Bolivia, a member of INTELSAT, which has not associated with the INTELSAT Article XIV(d) consultation for the use of the PAS-1 satellite for interconnected services. Until such time as Bolivia's association with the appropriate INTELSAT consultation has been completed, service between the U.S. and Bolivia via the PAS-1 satellite is deferred.

ATTACHMENT A

COUNTRIES TO BE SERVED VIA INTELSAT
(10 64 kbps equivalent circuits private line & switched services other than IBS, ITS & Datanet)*

(A) Atlantic Ocean Area Regions

Latin America

Antigua	Curacao	Netherlands Ant.
Argentina	Dominican Republic	Nicaragua
Aruba	Ecuador	Panama
Bahamas	El Salvador	Paraguay
Barbados	French Guiana	Peru
Belize	Grenada	St. Lucia
Bermuda	Guantanamo Bay	St. Vincent
Bolivia	Guatemala	Surinam
Brazil	Guyana	Trinidad & Tobago
Cayman Islands	Haiti	Turks & Caicos Isles
Chile	Honduras	Uruguay
Colombia	Jamaica	Venezuela
Costa Rica	Martinique	

Europe

Austria	Ireland	San Marino
Belgium	Italy	Slovenia
Croatia	Liechtenstein	Spain
Cyprus	Luxembourg	Sweden
Denmark	Malta	Switzerland
Finland	Monaco	Turkey
France	Netherlands	United Kingdom
Germany	Norway	Vatican
Greece	Portugal	Yugoslavia
Iceland		

Middle/Near East and Africa and Other Europe

Algeria	Belarus	Canary Islands
Angola	Benin	Cape Verde
Armenia	Botswana	Central African Rep.
Ascension Isl.	Bulgaria	Chad
Azerbiajan	Burkina Faso	Congo
Azores	Burma	Czechoslovakia
Bahrain	Cameroon	Diego Garcia

* Note: The specific number of circuits required for specific countries will depend on TLC's customers.

ATTACHMENT A (Cont'd)

COUNTRIES TO BE SERVED VIA INTELSAT

(10 64 kbps equivalent circuits private line & switched services other than IBS, ITS & Datanet)*

Middle/Near East and Africa and Other Europe (Cont'd)

Egypt	Lesotho	Senegal
Estonia	Liberia	Sierra Leone
Ethiopia	Libya	South Africa
Gabon	Lithuania	Sri Lanka
Gambia	Madagascar	Sudan
Georgia	Malagasy Rep.	Swaziland
Ghana	Malawi	Syria
Gibraltar	Mali	Tajikistan
Guinea	Mauritania	Tanzania
Hungary	Moldova	Togo
Iran	Morocco	Tunisia
Iraq	Mozambique	Turkmenistan
Israel	Niger	United Arab Emirates
Ivory Coast	Nigeria	Yemen
Jordan	Oman	Zaire
Kazakhstan	Pakistan	Zambia
Kenya	Poland	Zimbabwe
Kuwait	Qatar	Uganda
Kyrgyzstan	Romania	Ukraine
Latvia	Russian Federation	Uzbekistan
Lebanon	Saudi Arabia	

(B) Pacific Ocean Area Region

American Samoa	Japan	Philippines
Australia	Kiribati	Ponape
Brunei	Korea	Saipan
China (Peoples Republic Of)	Kosrae	Singapore
Christmas Is.	Majuro	Solomon Is.
Cook Island	Malaysia	Sri. Lanka
Ebeye	Mariana Is.	Taiwan
Fiji Islands	Nauru	Thailand
French Polynesia	New Caledonia	Tonga
Guam	New Guinea	Truk
Hong Kong	New Zealand	Vanuatu
India	Palau	Western Somoa
Indonesia	Papua New Guinea	Yap

* Note: The specific number of circuits required for specific countries will depend on TLC's customers.

ATTACHMENT B

COUNTRIES TO BE SERVED VIA PAS-1
(NOT INTERCONNECTED)

TLC is authorized to establish ten (10) 64-kbps circuits between the U.S. and each of the following locations. TLC is also authorized to establish a total of four (4) 36-MHz circuits to be used for all locations based on service requirements.

(A) For Communications NOT INTERCONNECTED with the Public Switched Network

Ku-band Countries

Albania
Anguilla
Armenia
Austria
Azerbaijan
Bahamas
Belarus
Belgium
Bermuda
Bulgaria
British Virgin Is.
Cayman Islands
Czechoslovakia
Denmark
Estonia
France
Georgia
Germany
Greece
Hungary
Ireland
Italy
Kazakhstan
Kyrgyzstan
Latvia
Lithuania
Luxembourg
Moldova
Monaco
Montserrat
Netherlands
Poland
Portugal
Romania
Russian Federation
Spain
Sweden
Switzerland
Tajikistan
Turkmenistan
Turks & Caicos Is.
Ukraine
United Kingdom
Uzbekistan
Yugoslavia

C-band Countries

Anguilla
Antigua
Argentina
Aruba
Bahamas
Barbados
Barbuda
Belize
Bermuda
Bolivia
Brazil
British Virgin Is.
Cayman Islands
Chile
Colombia
Costa Rica
Dominica
Dominican Republic
Ecuador
Grenada
Guatemala
Guyana
Haiti
Honduras
Jamaica
Mexico
Montserrat
Netherlands Ant.
Panama
Paraguay
Peru
St. Christopher and Nevis
St. Lucia
St. Vincent and the Grenadines
Suriname
Trinidad and Tobago
Turks & Caicos Is.
Uruguay
Venezuela

ATTACHMENT B (Cont'd)

COUNTRIES TO BE SERVED VIA PAS-1
(INTERCONNECTED)

Applicant is authorized to establish twenty-four 64-kbps circuits between the U.S. and Panama and six (6) 64-kbps circuits between the U.S. and each of the remaining locations.

(B) For Communications INTERCONNECTED with the Public Switched Network

C-band Countries

Bahamas	Dominican Republic	Panama
Costa Rica	Netherlands Ant.	Peru

Ku-band Countries

Albania	Georgia	Portugal
Armenia	Hungary	Romania
Azerbaijan	Kazakhstan	Russian Federation
Bahamas	Kyrgyzstan	Tajikistan
Belarus	Latvia	Turkmenistan
Bulgaria	Lithuania	Ukraine
Czechoslovakia	Moldova	United Kingdom
Estonia	Poland	Uzbekistan

ATTACHMENT E

COUNTRIES TO BE SERVED VIA COLUMBIA'S TDRS (NON-INTERCONNECTED)

TLC is authorized to establish five (5) 64-kbps circuits between the U.S. and each of the following locations. TLC is also authorized to establish a total of four (4) 36-MHz circuits on each satellite to be used for all locations based on service requirements.

TDRS-41	TDRS-174
Austria	Hong Kong
Bahamas	Japan
Belgium	Mexico
Canada	Philippines
Denmark	Republic of Korea
Finland	
France	
Germany	
Ireland	
Israel	
Jamaica	
Liechtenstein	
Luxembourg	
Mexico	
Netherlands	
Portugal	
Sweden	
Switzerland	
Turkey	
United Kingdom	

ATTACHMENT C (Cont'd.)

COUNTRIES TO BE SERVED VIA COLUMBIA'S TDRS (INTERCONNECTED)

TLC is authorized to establish five (5) 64-kbps circuits between the U.S. and the countries listed below.

TDRS-41	TDRS-174
United Kingdom	Hong Kong
Germany	

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

La Conexion Familiar, Inc.
Transferor,

and

LCF, Inc.
Transferee,

Application for authority pursuant to Section 214 of the Communications Act of 1934, as amended, to transfer control of international resale authorization

File No. I-T-C-94-248-TC

MEMORANDUM, OPINION AND ORDER

Adopted: June 24, 1994; Released: July 11, 1994

By the Chief, International Facilities Division:

1. On April 5, 1994, La Conexion Familiar, Inc. (La Conexion) and LCF, Inc. (collectively "the Applicants") filed the above-captioned application pursuant to Section 214 of the Communications Act of 1934, as amended, and Section 63.01 of the Commission's Rules requesting authority to transfer La Conexion's international Section 214 authorization to LCF. The application was placed on public notice on April 13, 1994. No comments were received.

2. La Conexion is a privately-held California corporation. La Conexion is a nondominant resale carrier, and has Section 214 authority to provide international switched voice service by reselling the international switched voice services offered by Sprint, AT&T and MCI.[1]

3. LCF, also a California corporation, is a wholly-owned subsidiary of US Telecom, a Kansas corporation which, in turn, is a wholly-owned subsidiary of Sprint Corporation. LCF does not hold any Section 214 authorizations, and after the transfer will become a nondominant carrier providing telecommunications services on a resale basis both within the United States, and from the United States to numerous international points.

4. The Applicants request authorization for a transfer pursuant to an agreement entered into between the carriers on December 10, 1992, whereby Sprint and LCF will purchase the assets of La Conexion. The Applicants state that a grant of this application will serve the public interest by enabling La Conexion to realize networking efficiencies and economies of scale, thereby facilitating the provision of superior service to subscribers at lower costs. The Applicants state that by La Conexion affiliating itself with Sprint, La Conexion's customers will not experience any degradation in service and will continue to enjoy the same superior transmission quality as they currently receive. They will also enjoy the benefits of any enhancements made in Sprint's network. Further, LCF will continue to operate under the trade name of La Conexion Familiar.

5. In view of the foregoing, we conclude that consent to the transfer of La Conexion's Section 214 authorization to LCF will not adversely affect the public interest.

6. Accordingly, IT IS ORDERED, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and Section 63.01 of the Commission's Rules, 47 C.F.R. § 63.01, that the application of La Conexion Familiar, Inc. and LCF, Inc., File No. I-T-C-94-248-TC, IS GRANTED and we consent to the transfer of the international Section 214 authorization held by La Conexion, originally granted in File No. I-T-C-91-133, to LCF.

7. IT IS FURTHER ORDERED, pursuant to Section 203 of the Communications Act, as amended, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, that LCF, Inc. must continue to maintain tariffs for the services authorized in this order.

8. IT IS FURTHER ORDERED that LCF, Inc. must file annual reports of overseas telecommunications traffic as required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

9. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the Applicants seek authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

10. This order is issued under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. §§ 1.106, 1.115, may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2), 47 C.F.R. § 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] *Sonicraft, Inc. et al.*, 6 FCC Rcd 4505 (1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORP. File No. I-T-C-94-250

Application for authority to acquire and operate facilities for service between the U.S. and Cambodia.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: June 24, 1994; Released: July 11, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Cambodia by MCI Telecommunications Corporation (MCI).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-250 IS GRANTED and MCI is authorized to:

a. own and operate a one-half interest in 14 voice-grade circuits in the HAW-4 and ANZCAN cable systems between Point Arena, California and Sydney, Australia;

b. lease and operate 14 voice-grade satellite circuits between the Perth, Australia earth station and an appropriate INTELSAT satellite over the Indian Ocean, connecting with similar circuits between the satellite and an earth station in Cambodia furnished by MCI's correspondent in Cambodia;

c. own and operate 14 voice-grade circuits in the Perth earth station to be used in conjunction with the satellite space egment capacity;

d. own and operate 14 voice-grade connecting circuits between Point Arena cable terminal and MCI's Dominguez Hills, California operating center;

e. lease a one-half interest in and operate necessary connecting facilities in Australia; and

f. use facilities in a, b, c, d and e above to provide MCI's regularly authorized services including switched voice service, between the U.S. and Cambodia.

3. IT IS FURTHER ORDERED that our authorization of MCI to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and Cambodia -- that is, private lines which originate in the United States and terminate in Cambodia or which originate in Cambodia and terminate in the United States. In addition, MCI may not -- and MCI's tariff must state that MCI's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or Cambodia end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that Cambodia affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order,* 7 FCC Rcd 559 (1991) *petitions for reconsideration pending.*

4. IT IS FURTHER ORDERED that neither MCI nor any persons or companies directly or indirectly controlling or controlled by MCI, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which MCI or any persons or companies controlling or controlled by MCI are parties.

5. IT IS FURTHER ORDERED that applicant shall file a copy of any operating agreement it enters into with its foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b).

9. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

VideoBridge International Corp. — File No. I-T-C-94-251

Application for authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell telecommunications services to international points

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: June 24, 1994; Released: July 11, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application filed by VideoBridge International Corp. (VideoBridge), we find that the public interest, convenience and necessity require its grant.

2. Accordingly, IT IS HEREBY ORDERED that application File No. I-T-C-94-251 IS GRANTED and VideoBridge is authorized to resell international private lines for the provision of non-interconnected private line services between the United States and Russia.

3. IT IS FURTHER ORDERED that VideoBridge is authorized to lease from authorized common carriers[1] up to one 384-kilobit circuit via an appropriate INTELSAT satellite for the provision of non-interconnected private line services between the United States and Russia.

4. IT IS FURTHER ORDERED that:

(a) VideoBridge shall file publicly any contracts entered into with other carriers or a contract summary in accordance with Section 203 of the Communications Act, 47 U.S.C. §203, and the *Interexchange Order*;[2]

(b) the services obtained by VideoBridge shall be made generally available to similarly situated customers at the same terms, conditions and rates; and

(c) VideoBridge shall file tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. IT IS FURTHER ORDERED that neither VideoBridge nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions which is denied to any other United States carrier by reason of any concession contract, understanding, or working arrangement to which VideoBridge or any such persons or companies controlling or controlled by VideoBridge are parties.

6. IT IS FURTHER ORDERED that our authorization of VideoBridge to resell international private lines for the provision of non-interconnected private line service is limited to the provision of such private line service between the United States and Russia -- that is, private lines which carry traffic that originates in the United States and terminates in Russia, or originates in Russia and terminates in the United States. In addition, VideoBridge may not -- and VideoBridge's tariffs must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or the foreign end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the foreign country affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking* (*Third Further Notice*), 7 FCC Rcd 7927 (1992).

7. IT IS FURTHER ORDERED that VideoBridge shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that VideoBridge shall file a copy of any operating agreement entered into with a foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

9. IT IS FURTHER ORDERED that this Order may be subject to future modification pursuant to the outcome of the *Phase II Third Further Notice* and any related proceedings.

10. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services Voyager seeks authority to provide. The transmission of money is not considered to be a common carrier service.

11. This Order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this Order (*see* Section 1.4(b)(2)).

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[1] VideoBridge intends to lease capacity pursuant to contract from IWL Communications, Inc. A copy of such contract must be filed with the Commission (see ¶ 4, *infra.*).

[2] *See Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880, 5902 (1991) (*Interexchange Order*).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

INFOACCESS, INC. File No. I-T-C-94-265

Application for authority to acquire and operate facilities for service between the U.S. and the Dominican Republic.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: June 24, 1994; Released: July 11, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and the Dominican Republic by InfoAccess, Inc.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-265 IS GRANTED, and InfoAccess is authorized to:

a. acquire on an Indefeasible Right of User (IRU) basis and operate a one-half interest in voice-grade circuits in the TCS-1 cable system;

b. lease from Comsat and operate voice-grade satellite circuits between an appropriately licensed United States earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in the Dominican Republic furnished by InfoAccess's correspondent in the Dominican Republic;

c. lease and operate circuits in the United States earth station to be used in conjunction with the space segment capacity;

d. acquire and operate a total of 192 voice-grade satellite and/or cable circuits;

e. lease and operate any necessary domestic connecting facilities; and

f. use said facilities to provide international communications services, including voice, data and private line services, between the United States and the Dominican Republic.

3. IT IS FURTHER ORDERED that our authorization of InfoAccess to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and the Dominican Republic -- that is, private lines which originate in the United States and terminate in the Dominican Republic or which originate in the Dominican Republic and terminate in the United States. In addition, InfoAccess may not -- and its tariff must state that InfoAccess's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or the Dominican Republic end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the Dominican Republic affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order,* 7 FCC Rcd 559 (1991) *petitions for reconsideration pending.*

4. IT IS FURTHER ORDERED that neither InfoAccess nor any persons or companies directly or indirectly controlling or controlled by InfoAccess, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which InfoAccess or any persons or companies controlling or controlled by InfoAccess are parties.

5. IT IS FURTHER ORDERED that InfoAccess shall file a copy of any operating agreement it enters into with its foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that InfoAcess shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

7. IT IS FURTHER ORDERED that InfoAccess shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that InfoAccess shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b).

9. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Intermedia Communications of Florida, Inc. — File No. I-T-C-94-258

Application for authority pursuant to Section 214 of the Communications Act of 1934, as amended, to provide private line services between the United States and various international points

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: June 24, 1994; Released: July 11, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the resale of international private lines for the provision of non-interconnected international private line services to the general public by Intermedia Communications of Florida, Inc. (ICI).[1]

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-258 IS GRANTED and ICI is authorized to resell, pursuant to the tariffs of authorized international common carriers,[2] international private lines not interconnected to the public switched network for the provision of international private line services[3] between the United States and each of the seventy-seven (77) international points specified in Appendix A.[4]

3. IT IS FURTHER ORDERED that ICI is authorized to lease and operate a one-half interest in up to 77 DS-1 circuits (672 64-Kbps circuits) for the provision of its authorized resale of international private lines for non-interconnected private line services, as specified in Appendix A.

4. IT IS FURTHER ORDERED that neither ICI nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which ICI or any such persons or companies controlling or controlled by ICI are parties.

5. IT IS FURTHER ORDERED that our authorization of ICI to resell international private lines for the provision of non-interconnected private line service is limited to the provision of such private line service between the United States and each of the 77 international points specified in Appendix A -- that is, private lines which carry traffic that originates in the United States and terminates in one of the 77 international points, or originates in one of the 77 international points and terminates in the United States. In addition, ICI may not -- and ICI's tariffs must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or the foreign end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the foreign country affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further*

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[1] ICI intends to provide international private line voice data, facsimile and video services. *See* Application at 5.

[2] The applicant proposes to resell the private lines of one or more of the following carriers pursuant to their following tariffs: AT&T Tariff FCC Nos. 1,2,4,9,11 and 12; MCI International Tariff FCC No. 1; Sprint Tariff FCC Nos. 1 and 2; IDB/Worldcom Tariff FCC Nos. 1,2,5 and 7; and WilTel Tariff FCC No. 2. *See* Letter from Catherine Wang, Counsel for ICI to Jennifer Warren, International Facilities Division, Common Carrier Bureau (dated May 25, 1994).

[3] The Commission has concluded that the public interest in cost-based international telecommunications services would be served by the encouragement of international resale, provided that steps were taken to ensure that such resale did not result in the unilateral diversion of U.S. inbound switched traffic to private lines, and thus, exacerbate the settlements deficit. The Commission, therefore, conditioned its resale policy by requiring U.S. carriers to permit resale of their international private lines only to those countries which afford equivalent resale opportunities. (*See Regulation of International Accounting Rates*, CC Docket 90-337, (*Phase II First Report and Order)*, 7 FCC Rcd 559 (1992).) Subsequently, the Commission stated that the resale of international private lines for the provision of international private line services, as opposed to switched services, does not implicate the settlements process to the extent such lines are used only to carry non-switched traffic that is not subject to the international settlements process, and thus clarified that the equivalency requirement does not apply to the resale of international private lines for private line services. Nonetheless, the Commission confirmed the right of an end user to interconnect its international private line to the PSN through, for example, its own PBX. (*See Regulation of International Accounting Rates*, CC Docket 90-337, *Phase II Order on Reconsideration and Third Further Notice of Proposed Rulemaking* (*Phase II Third Further Notice)*, 7 FCC Rcd 7927 (1992).)

[4] *See* Appendix A for list of authorized international points. We note that should Intermedia obtain any interest in facilities beyond the authorized seventy-seven international points for the purpose of providing common carrier services, including private line service, between the U.S. and other international points, such action would constitute an extension of line under Section 214 of the Act. Therefore, under the provisions of the Commission's *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied* 60 R.R. 2d 1435 (1986), it would be necessary for Intermedia to file additional applications for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

Notice of Proposed Rulemaking (*Third Further Notice*), 7 FCC Rcd 7927 (1992), *fONOROLA Corporation and EMI Communications Corporation* (*fONOROLA/EMI Order*), 7 FCC Rcd 7312 (1992), *Order on Reconsideration*, FCC 94-81 (released May 6, 1994).

6. IT IS FURTHER ORDERED that ICI shall file tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that ICI shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that ICI shall file copies of any operating agreements entered into with foreign correspondents with the Commission within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

9. IT IS FURTHER ORDERED that this Order may be subject to future modification pursuant to the outcome of the *Phase II Third Further Notice* and any related proceedings.

10. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services Voyager seeks authority to provide. The transmission of money is not considered to be a common carrier service.

11. This Order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this Order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX A

1 DS-1 Circuit to Each of the Countries Listed Below

Antigua
Argentina
Australia
Austria
Bahamas
Barbados
Belgium
Belize
Bermuda
Botswana
Brazil
Cambodia
Canada
Chile
China
Commonwealth of Independent States
Colombia
Costa Rica
Denmark
Dominica
Dominican Republic
Ecuador
Egypt
El Salvador
France
Germany
Greece
Guadeloupe
Guatemala
Guyana
Haiti
Honduras
Hong Kong
India
Indonesia
Iran
Ireland
Israel
Italy
Jamaica
Japan
Jordan
Kenya
Malaysia
Mauritius
Mexico
Mozambique
Netherlands
Nicaragua
Nigeria
Norway
Pakistan
Panama
Peru
Poland
Portugal
Saudi Arabia
Seychelles
Singapore
Somalia
South Korea
South Africa
Spain
St. Lucia
Swaziland
Sweden
Switzerland
Taiwan
Tanzania
Thailand
Trinidad
United Kingdom
Venezuela
Vietnam
Yugoslavia
Zambia
Zimbabwe

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

National Exchange Carrier Association, Inc. AAD 94-34

Proposed Modifications to the Interstate Average Schedules

MEMORANDUM OPINION AND ORDER

Adopted: June 30, 1994; Released: June 30, 1994

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. The Commission's rules permit certain local exchange carriers to receive interstate settlements on the basis of formulas that are "designed to produce disbursements to an average schedule company that simulate the disbursements that would be received... by a [cost study] company that is representative of average schedule companies."[1] The Commission's rules also require NECA, on an annual basis, to submit proposed modifications to the average schedules or certify that a majority of its Board of Directors believes that no modifications are warranted.[2] On December 31, 1993, NECA filed "Proposed Modifications to the Interstate Average Schedules" ("1993 Filing") which, if approved, would become effective on July 1, 1994.[3] On February 2, 1994, we invited comments on NECA's proposed modifications.[4] We initiated this proceeding to determine whether the modifications proposed by NECA comply with Section 69.606(a) of the Commission's rules. In this Order, we approve NECA's proposed modifications with an effective date of July 1, 1994.

II. OVERVIEW OF PLEADINGS

A. NECA's Filing

2. Average schedule companies currently receive compensation for the costs of providing interstate access pursuant to formulas that we approved. These formulas became effective on May 1, 1993 and July 1, 1993.[5] NECA states that its proposed revisions to the average schedule formulas are based on a study that is similar to those NECA conducted during 1991 and 1992.[6] NECA states that the proposed formulas will produce settlements from July 1, 1994 through June 30, 1995 that simulate disbursements that would be received during that period by a cost company that is representative of average schedule companies.

3. NECA further states that, on average, companies can expect a combined settlement increase of 1.7 percent from the proposed modifications.[7] Specifically, NECA states that average schedule companies should experience an average increase of 15.1 percent above current settlement levels for the common line portion of their settlements and average reductions of 6.8 percent below current settlements for the traffic sensitive portion.[8] NECA alsostates that its proposed changes in the formulas reflect cost increases, growth in access demand, the impact of the Commission's rule change for the recovery of General Support Facility ("GSF") costs,[9] recovery of contributions to the Telecommunication Relay Service ("TRS") fund, and increases in Carrier Access Billing system ("CABS") costs. NECA also proposes to implement an improved methodology for counting circuits at host/remote offices, and SS7 settlement formulas.[10]

4. According to NECA, 60 study areas will experience settlement decreases ranging from 0.1 percent to 10 percent of current settlements. NECA states that smaller average schedule companies will generally experience greater settlement increases per central office than larger average schedule companies. NECA attributes this disparity to the relatively greater effect of increased CABS billing costs on smaller average schedule companies.[11]

B. Comments

5. ICORE, NTCA, OPASTCO, and USTA urge the Commission to approve the proposed schedules. MCI questions several statistical aspects of NECA's filing, and requests additional documentation regarding the size and structure

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[1] 47 C.F.R. § 69.606(a).

[2] 47 C.F.R. § 69.606(b).

[3] The proposed modifications to the average schedule formulas are contained in NECA's filing at VIII-1 through VIII-6. A cost study company receives compensation on the basis of its actual interstate costs that are substantiated by cost studies.

[4] National Exchange Carrier Association Dec. 31, 1993 Proposed Modifications to the Interstate Average Schedules, *Public Notice*, 9 FCC Rcd 565 (1994). Comments were filed by ICORE, Inc. (a consulting firm) ("ICORE"), MCI Telecommunications Corporation ("MCI"), the National Telephone Cooperative Association ("NTCA"), the Organization for the Advancement of Small Telephone Companies ("OPASTCO"), and the United States Telephone Association ("USTA"). Reply comments were filed by ICORE, MCI, NECA, NTCA, and USTA.

[5] National Exchange Carrier Association, Inc., *Memorandum Opinion and Order*, 8 FCC Rcd 3122 (Com. Car. Bur. 1993); National Exchange Carrier Association, Inc., *Order*, 8 FCC Rcd 4861 (Com. Car. Bur. 1993) (*1993 Average Schedule Order*). The formulas currently in effect are referred to herein as the "1993 Schedules." NECA's December 31, 1992 filing proposing these schedules is referred to as the "1992 Filing." The data and analysis upon which the 1992 Filing was based are referred to as the "1992 Study." Similar nomenclature is followed with respect to other years' filings.

[6] Appendix F of the 1993 Filing contains flowcharts that describe NECA's study methodology.

[7] 1993 Filing at Section VII.L. This figure is based on NECA's analysis of the proposed formulas changes relative to those currently in effect, with demand held constant.

[8] 1993 Filing at i. NECA states that an increase of 15.1 percent in common line settlements, coupled with a reduction of 6.8 percent in traffic sensitive settlements, will result in an increase of 1.7 percent in combined settlements because of the weighting of the formulas in this calculation.

[9] *See* 47 C.F.R. § 69.307(c).

[10] 1993 Filing at I-2. NECA states that these changes will simplify settlement methods and increase settlement accuracy. SS7 settlement formula revisions are from the initial formula.

[11] *Id.* at I-3.

of NECA's sample techniques.[12] MCI states that NECA needs to provide additional data to support its regression analyses, outlier evaluations, and test statistics.[13]

6. While ICORE supports the adoption of aspects of the proposed schedules that will increase settlements, ICORE proposes modifications to those average schedule formula revisions that would result in settlement reductions. ICORE also suggests a phase-in, or transition period, for companies adversely affected by the line haul formula change.[14] ICORE suggests further changes that would authorize use of optional traffic studies to obtain settlements based on actual minutes for remote offices.[15] Finally, ICORE proposes special reimbursements to cover the costs of converting to four digit Carrier Identification Codes ("CICs")[16] and to recognize Local Transport Restructure ("LTR") costs.[17]

III. SPECIFIC COMMENTS/DISCUSSION

A. MCI Communications Corporation

1. Sampling Methodology

7. MCI states that a correct sampling method is important to ensure that the sample yields estimated average schedule results that accurately represent the results that would be obtained if the average schedules formulas were computed from data from the entire population of average schedule companies.[18] MCI asserts that NECA failed to explain why it chose a sample size of 200 companies and failed to document the allocation of sample company data among various strata.[19] In reply, NECA states that it described in its 1993 Filing how it used data from a scientific sample of average schedule and cost companies, and selected companies according to a five-year sample design that was created for the 1989 Study.[20] NECA claims that this five-year design was revised with supplemental data in 1990 to account for significant changes in the population that occurred after the initial sample was drawn.[21] NECA asserts that it fully documented in its 1988 Filing the considerations underlying its decision to use a sample size of 200 average schedule and cost companies (including analyses of the sample and the individual strata).[22] NECA further states that it initially selected the current five-year sample for use in its 1989 Study and that it explained the mechanics of and rationale for the five-year selection process in its 1989 Filing. NECA also claims that it documented the development of its current "combined" sample for the 1992 Filing and that it made no changes to the sample design for the 1993 Filing. USTA replies that NECA's filing has provided all the data necessary to establish statistical reliability and to support the proposed modifications and that MCI's concerns regarding NECA's sample are unwarranted.[23] ICORE states that to the extent that MCI raises new issues, or issues that need revisitation, NECA should be directed to furnish the requested information.[24]

8. After reviewing NECA's previous filings, we conclude that NECA has adequately documented its sampling techniques and the allocation of sample companies to strata.[25] We find no fault with NECA's sample design, but we do conclude that in future filings NECA should refile all sample selection criteria and data that are utilized, in any respect, in the current filing. Interested parties should not have to do historical research into NECA's selection criteria or its sample design in order to evaluate its current filing. NECA's filing approach which, in places, incorporates by reference portions of prior filings, tends to make its statistical methodologies unnecessarily opaque, thereby causing commenting parties to expend needless effort in attempting to understand NECA's statistical techniques.

2. Provision of Data

9. MCI asserts that NECA did not provide data for the average schedule companies that were included in its sample, and that these data should be provided to permit verification of NECA's equations and allow an assessment of whether alternative equations would fit the data better.[26] In response, NECA contends that it provided all of the data used in its 1993 Study, and that Appendices C and D of the 1993 Filing furnish the data that MCI claims are missing.[27] These data included information about carriers' central offices, land and support, and cable and wire facilities. After reviewing the 1993 Filing, we conclude that NECA provided sufficient data for the average schedule companies that were included in the sample.

3. Exclusion of Outliers

10. In its 1993 Filing, NECA excluded extreme values of certain data. MCI states that NECA did not explain its choice of limits for exclusion, and that it did not provide the data necessary to determine whether NECA's exclusions ("outliers") were reasonable.[28] In its reply comments, NECA asserts that its 1993 Filing includes the data requested by MCI for outlier exclusion evaluation. Section V.B.1 of the 1993 Filing describes NECA's evaluation of each study area's individual account growth rates, and the impact of those data on the average growth rates.[29] NECA contends that it excluded data from study areas whose account growth rates differ significantly from the account

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12 ICORE Comments at 6.
13 *Id.* at 5-7.
14 This formula compensates companies for interstate transport costs incurred to terminate switched access interexchange trunk facilities on end office switches and on tandem switches.
15 ICORE Comments at 6-10.
16 *Id.* at 11.
17 *Id.* at 13.
18 MCI Comments at 4.
19 *Id.* Strata are used to combine sampled companies into groups with similar characteristics. *See generally* 1993 Filing at Section II.
20 NECA Reply Comments at 5, citing 1993 Filing at II-1.
21 *Id.*, citing 1990 Filing at 1-4, Section II.
22 *Id.* at 6.
23 USTA Reply at 2.
24 ICORE Reply at 4.
25 *See* NECA's 1988 Filing at Section II (Sample Selection); NECA's 1989 Filing at Section II. (Sample Selection).
26 MCI Comments at 5.
27 NECA Reply at 7.
28 MCI Comments at 5-6.
29 NECA Reply at 7-8. NECA states that the impact of a study area's data on the average growth rate equals the difference between the average rate calculated using all data and the average rate calculated excluding the data of that one study area. *See id.*

growth rates of other study areas.[30] NECA states that it concluded that a study area's account growth rate was significantly different if it substantially exceeded differences associated with all study area data points that were not designated as outliers.

11. MCI complains that NECA excluded data from companies that showed an increase in plant specific expenses of more than 197 percent and that this exclusion raises questions that cannot be answered without the entire data set.[31] In response, NECA states that plant specific expenses data of average schedule companies are contained in Appendix C1, pages C1-6 through C1-8, and in Appendix C2, pages C2-6 through C2-8, of the 1993 Filing.[32] NECA asserts that while account growth outlier analysis is important to ensuring that costs are targeted accurately to individual settlement formulas, that analysis did not have a major effect on the overall forecast of revenue requirements.[33] To support this point, NECA adds that if no outlier screening had been used, the projected revenue requirement would have increased by 6.6 percent, instead of the proposed increase of 6.5 percent, producing only slightly higher proposed settlement formulas.[34]

12. After reviewing NECA's reply comments and examining the data that are contained in Section V.B.1 and Appendix C of NECA's 1993 Filing, we conclude that NECA has adequately explained its limits for outlier exclusion and has provided sufficient data to evaluate "the reasonableness of its outlier exclusions.

4. Test Statistics

13. MCI contends that NECA did not report the F- or t-statistics associated with its formula development process, and argues that these statistics are needed to quantify how well the proposed formulas fit the data from which they were derived.[35] In response, NECA asserts that its filing fully documents the statistical accuracy of the regression models underlying the proposed formulas.[36] NECA contends that its 1993 Filing includes 59 models developed by statistical regression methods for cost separations, access allocations, demand forecasting, and settlement modeling. NECA also contends that it chose variables for each of these models that are statistically significant.[37] NECA further claims that it included R-squared statistics in its filing for 51 of the 59 models.[38] NECA submitted with its reply R-squared statistics for the remaining models that, according to NECA, were inadvertently omitted from the 1993 Filing.[39]

14. MCI also expresses concern over the variance in the values of the R-squared statistics.[40] As MCI notes, NECA was able in some cases to use variables that produce very high R-squared values, while in other cases NECA selected variables that produced lower values.[41] In response, NECA states that acceptable levels of variance in R-squared statistics associated with average schedule formulas have been discussed in the context of earlier average schedule filings.[42] NECA contends that it would be preferable to use variables that produce higher, rather than lower, R-squared statistics. NECA argues, however, where such variables are not available it is necessary to choose the best available variable.[43] NECA asserts that MCI makes no showing that the inclusion of a smaller number of models with low R-squared statistics diminishes the overall accuracy of the formulas, nor does MCI provide any suggestions for alternative variables that might produce higher R-squared values.[44]

15. ICORE replies that none of the statistical sampling questions raised by MCI are sufficiently serious to justify postponement of the adoption of the proposed schedules.[45] NTCA replies that many of MCI's questions and criticisms apparently were based on MCI's failure to understand an established process already documented in previous filings that were reviewed by the Commission and approved in principle.[46]

16. We agree with ICORE in this regard and conclude that NECA has provided satisfactory answers and supplementary data in its reply comments. We caution NECA, however, that it is responsible for providing all statistical and underlying data in support of its filing, at the time of the filing. Interested parties should not be required to wait for NECA to provide essential data in reply comments or a supplementary letter.

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[30] *Id.* at 8.
[31] MCI Comments at 6.
[32] NECA Reply at 8. NECA states that these expenses include Network Support Expenses, General Support Expenses, Central Office Expenses, and Cable and Wire Facilities Expenses.
[33] *Id.* at 9.
[34] *Id.*
[35] MCI Comments at 6-7. F- and t-statistics permit the reliability of the equations (and of coefficients within equations) to be assessed, as distinguished from the measure of dispersion (or "goodness of fit") that is contained in the R-squared statistic. The R-squared statistic (*i.e.*, the coefficient of multiple correlation) permits an assessment of the dispersion of data around the mathematical function that has been fitted to that data or, in other words, how well the formula fits the data. *See generally* Chou, Ya-lun, *Statistical Analysis* at 377-81, 385, 387-89, 609, 618, 629, 645, 651, 776, 779 (Holt, Rinehart and Winston, Inc., 1969); Kane, Edward, *Economic Statistics & Econometrics* at 230-49, 268-71 (Harper & Row, 1968); Clelland, Richard et al, *Basic Statistics with Business Applications* at 333-36, 455-59 (John Wiley and Sons, 1966).
[36] NECA Reply at 9.
[37] *Id., citing* 1993 Filing at Section IV. For background information on statistical significance, see *Basic Statistics with Business Applications, supra* and *Statistical Analysis, supra.* %
[38] NECA Reply at 10.
[39] NECA reply at 10. NECA contends that t-statistics are included in the 1993 Filing where those t-statistics are relevant. *Id.* For example, Exhibit 5.5 of the 1993 Filing specifies the variables and associated t-statistics in the econometric model for forecasting access minutes. According to NECA, this exhibit was included to demonstrate that, while not *all* t-statistics were significant, the variables in the model were useful nonetheless. *See id.* F- and t- statistics are contained in a letter from Richard A. Askoff, NECA, to the Secretary, FCC, dated March 16, 1994. NECA asserts that in other cases, these statistics wereh)&omitted because they are equivalent to data already included in the filing. *Id.*
[40] MCI Comments at 7.
[41] *Id.*
[42] NECA Reply at 12.
[43] *Id.*
[44] *Id.*
[45] ICORE Reply at 4.
[46] NTCA Reply at 3.

B. ICORE

1. Transition Plan- Host/Remote Circuit Counts for Line Haul Costs

17. In the 1993 Filing, NECA proposes to use a new host/remote circuit count methodology in order to provide more accurate settlements.[47] Use of the new methodology will cause a reduction in settlements for some companies. ICORE contends that the Commission should specify a phase-in, or transition, for those companies that would be adversely affected by NECA's change in the line haul methodology,[48] because these same companies will experience significant line haul settlement reductions. In response, NECA states that the 1993 Filing proposes a significantly improved method of counting line haul circuits between host and remote offices.[49] NECA also asserts that the proposed method is substantially more accurate than the current "prorate" methodology,[50] which NECA found to produce less accurate results when applied to complex host/remote networks, particularly those in equal access areas with multiple interexchange carriers.[51] NECA contends that a transition plan is not needed because only a few carriers face material settlement reductions.[52] MCI states that ICORE has supplied no evidence that NECA's change has a significant effect on any company. MCI observes that NECA itself states that its new method is more accurate in those cases in which companies settlements are changing the most. MCI also notes that it is not clear why only methodology changes *adversely* affecting companies that receive average schedule settlements should receive this phase-in treatment.[53]

18. We agree with NECA and MCI that a transition plan is not needed, particularly since NECA has demonstrated that its line haul revisions provide *more accurate*, rather than *less accurate*, settlements.

2. Optional Traffic Studies- Host/Remote Circuit Counts for Line Haul Costs

19. ICORE also recommends that average schedule companies with host/remote complexes be allowed to conduct optional traffic studies to obtain actual minutes for their remotes for use in determining their settlements.[54] ICORE claims that if the studies were optional, companies with unusual traffic characteristics would be able to measure their minutes more accurately, while imposing no additional burden on other companies that elect to use NECA's new methodology. In response, NECA states that allowing individual average schedule companies to use optional traffic studies for selected portions of settlements would be inconsistent with average schedule settlements,[55] and would make the total settlement process less accurate.[56] MCI raises two major concerns with ICORE's proposal: (i) if the traffic studies are optional, only companies that will receive a higher average schedule settlement will perform and report these optional studies; and (ii) the Commission's rules require that average schedule disbursements simulate the disbursements that would be received by a representative "cost study" company.[57] NTCA replies that ICORE's approach is inconsistent with the regulatory treatment of average schedule LECs.[58] NTCA maintains that allowing LECs to pick surrogate settlements for some costs while using actual measurements in others would undermine the credibility of the average schedules. USTA replies that optional studies are not consistent with the average schedule process and that ICORE's suggestion should not be adopted.[59]

20. If companies are permitted the option of using company-specific data to determine their average schedule settlements, the entire structure of the average schedule settlement concept would be undermined. This ICORE proposal would introduce the types of complexities and administrative burdens that the average schedule settlement process was designed to avoid. In addition, on the basis of the record before us, such an approach would lead to a substantial increase in the aggregate interstate revenue requirement of average schedule carriers. ICORE has not identified any offseting benefit to the ratepaying public that would justify approval of its proposal. For these reasons, we agree with MCI, NECA, NTCA, and USTA that optional studies should not be permitted.

3. Special Reimbursement to Cover Additional Costs

21. ICORE argues that NECA should institute a special reimbursement to cover the costs of converting to the four digit CIC[60] and implementing the Commission's interim rules governing the restructuring of local transport rates.[61] In response, NECA contends that preliminary 1993 cost

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[47] *Id.*, 1993 Filing at V-33. NECA proposes to replace the current prorate methods with a methodology that relies on the standard telephone network engineering "Erlang B" formula. *Id.* This approach calculates circuit requirements based on interstate access usage of the access lines at each remote office. *See* 1993 Filing Exhibit 5.11 at V-35.

[48] ICORE Comments at 6.

[49] NECA Reply at 13.

[50] *Id., citing* 1993 Filing at Exhibit 5.13 (showing that the proposed method *improves accuracy by 45 percent over the current prorate method).* NECA states that this improvement is so substantial that, even without other benefits of the proposed method, the Commission should require its use. 1993 Filing at V-39.

[51] Id. at footnote 41.

[52] *Id.* at 14. Appendix E of the 1993 Filing shows that only seven carriers (out of more than six hundred companies) can expect overall settlement reductions in excess of five percent. Five of these carriers have experienced relatively high line haul settlements that have been associated with extensive host/remote networks having connections to many interexchange carriers. The remaining two carriers are primarily affected by the new allocation of GSF investment to common line. According to NECA, these carriers have uncommonly high traffic volumes relative to the number of subscribers, causing the GSF costs removed from traffic sensitive schedules to exceed the amount of the GSF costs added to the common line schedule. *See id.*

[53] MCI Reply at 5.

[54] ICORE Comments at 9.

[55] NECA Reply at 15, *citing* Revisions to the Average Schedules Proposed by NECA on Oct. 3, 1988 *Memorandum Opinion and Order*, 4 FCC Rcd 2804 (Com. Car. Bur. 1989); Proposed Revisions to the Average Schedules *Memorandum Opinion and Order*, 1 FCC Rcd 1363 (Com. Car. Bur. 1986).

[56] *Id.* According to NECA, carriers would submit individual office traffic studies only in cases where factors from those studies exceed the average. In this way optional traffic studies would progressively inflate total line haul settlements in a way that would exceed actual revenue requirements.

[57] MCI Reply at 3. *See also* 47 C.F.R. § 69.606(a).

[58] NTCA Reply at 5.

[59] USTA Reply at 2.

[60] ICORE Comments at 11.

[61] *Id.* at 13.

data that were available prior to its 1993 Filing did not identify any particular costs that warranted special settlement treatment. NECA further asserts it has begun to analyze more detailed data concerning the costs related to CIC expansion and LTR.[62] NECA also states that after it completes a comprehensive analysis of LEC data pertinent to this issue, it will propose whatever actions are necessary to ensure that average schedule companies are compensated for the costs of CIC expansion and LTR.[63] NECA states that this issue will be addressed in its 1994 Filing and, if unanticipated circumstances warrant, it will file for an interim change prior to the annual update filing.[64] In response, MCI contends that even if there were additional billing and switch conversion costs due to these factors, ICORE has not demonstrated that these additional costs are so large that they exceed the costs already reflected in the historical cost data used to estimate the average schedules. MCI states further that if special recovery of these expenses were to be allowed, there is the possibility of double-recovery of these expenses in later years.[65]

22. We agree with MCI that ICORE has not shown that these additional costs exceed those costs that are already reflected in the historical cost data used in the average schedules estimation process. Based on NECA's analysis of the 1993 data, we conclude that separate settlement elements or special reimbursements to cover these asserted additional costs are not needed at this time. We will await the results of NECA's study of the incremental costs of CIC expansion and LTR before deciding whether additional compensation is warranted.

III. CONCLUSION

23. We conclude that NECA's Proposed Modifications to the Interstate Average Schedule Formulas are not inconsistent with applicable Commission rules; that the proposed modifications should be approved; and that the proposed modifications should become effective July 1, 1994. We further conclude that in all future NECA filings that seek to modify the average schedule formulas, NECA shall provide all measurements of statistical significance for all formulas that it has evaluated in developing its proposed revisions to the average schedule formulas.

IV. ORDERING CLAUSES

24. ACCORDINGLY, IT IS ORDERED that NECA's December 31, 1993 Proposed Modifications to the Interstate Average Schedule Formulas ARE APPROVED with an effective date of July 1, 1994.

25. IT IS FURTHER ORDERED that in all future NECA filings that seek to modify any average schedule formula, NECA SHALL PROVIDE all statistical measurements[66] that are necessary, or desirable, for an objective assessment of the accuracy of the formulas that NECA proposes in satisfaction of the requirement of Section 69.606(a) of the Commission's rules.

26. IT IS FURTHER ORDERED that this order is effective immediately upon release.

FEDERAL COMMUNICATIONS COMMISSION

A. Richard Metzger, Jr.
Acting Chief, Common Carrier Bureau

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[62] NECA Reply at 16. The average schedule formulas are developed on the basis of actual (*i.e.*, historical) data that necessarily require time for the development of accurate compensation formulas. Moreover, according to NECA, CIC and LTR costs must be isolated from other costs incurred by average schedules companies. Specifically, NECA states that CIC costs are intertwined with the costs of generic switch upgrades which, among other things, include four-digit CIC capability. Similarly, CABS costs for implementing LTR may be intermingled with other CABS enhancements. 1993 Filing at VII-12. Factors that determined CABS costs include the number of interexchange carriers, the number of exchanges served, the number of separate special access services and service orders billed and the complexity of "meet point" arrangements.

[63] NECA Reply at 17.

[64] *Id.*

[65] MCI Reply at 6.

[66] At a minimum, these measurements shall include the measures of statistical significance of models and the statistical significance of the estimated coefficients of those models. In each annual filing, NECA shall also include all sample selection design criteria and data, as well as F-, t-, and R-squared statistics. See generally paras. 8, 16 *infra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-57

In the Matter of

Amendment of Section 73.202(b), RM-8467
Table of Allotments,
FM Broadcast Stations.
(Sanger and Sherman, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 7, 1994; Released: July 11, 1994

Comment Date: September 1, 1994
Reply Comment Date: September 16, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Harmon G. Husbands, licensee and proposed Assignor, along with Durant Broadcasting Corporation proposed Assignee ("petitioners"), of Station KWSM-FM, Channel 281A, Sherman, Texas, proposing the substitution of Channel 281C3 for Channel 281A at Sherman, the reallotment of Channel 281C3 from Sherman to Sanger, Texas, and the modification of petitioners' license to specify Sanger as Station KWSM-FM's community of license. Petitioners state they will apply for Channel 281C3 at Sanger, Texas if allotted.

2. Petitioners states that Station KWSM-FM has been unable to survive economically in the Denison-Sherman market and, in fact, went silent on January 5, 1994. Petitioners contend that changing the station's community of license to Sanger, Texas, is essential to the station's survival. In support of their proposal, petitioners note that Sanger is an incorporated municipality, having its own Mayor and city council, a police department, independent school district, library and newspaper. Petitioners state that the current population is 4000 persons, with a trade area population of ten to twelve thousand. Petitioners maintain that their proposal to reallot Channel 281C3 to Sanger will further the Commission's allotment priorities by providing the community with its first local aural transmission service while the Denison-Sherman market will retain local aural transmission service from six local services.[1]

3. We believe the proposal warrants further consideration since it could provide Sanger with its first local aural transmission service. However, since petitioners propose to relocate Station's KWSM-FM's transmitter site, we request that the they provide information showing the areas and populations which will receive new service and the areas and populations which will lose existing service if Channel 281C3 is reallotted to Sanger. The study should also indicate the number of reception services which are now available within the gains and loss areas.

4. Channel 281C3 can be allotted to Sanger in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.3 kilometers (6.4 miles) northwest to accommodate petitioners' desired site.[2] As requested, we also propose to modify petitioners' authorization for Station KWSM-FM at Sherman to specify Sanger as its community of license. In accordance with Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 281C3 at Sanger or require the petitioners to demonstrate the availability of an additional equivalent class channel for use by such parties.

5. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Sherman, Texas	244A, 281A	244A
Sanger, Texas	--	281C3

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **September 1, 1994**, and reply comments on or before **September 16, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Richard M. Riehl, Esq.
Haley, Bader & Potts
4350 North Fairfax Drive
Suite 900
Arlington, Virginia 22203-1633
(Counsel for petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's

[1] Petitioners contend that Denison and Sherman are contiguous communities and are regarded locally and by Arbitron as a single market. Thereby petitioners submit that there are currently seven stations assigned to the Denison-Sherman market. For purposes, of this proceeding we will credit Sherman with having four local aural transmission services which include Stations KIKM-FM, KWSM-FM, KXEB-AM and KJIM-AM. Petitioners intent to credit Sherman with stations that are licensed to Denison is misplaced since those stations are only required to serve the community of Denison.

[2] The coordinates for Channel 281C3 at Sanger are North Latitude 33-25-10 and West Longitude 97-15-28.

Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202)634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-79

In the Matter of

Amendment of Section 73.202(b), RM-8493
Table of Allotments,
FM Broadcast Stations.
(Pine Hill, Alabama)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 29, 1994; Released: July 11, 1994

Comment Date: September 1, 1994
Reply Comment Date: September 16, 1994

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by R. J. Miller ("petitioner") requesting the allotment of FM Channel 244A to Pine Hill, Alabama, as that community's first local aural transmission service. Petitioner stated that he, or an organization of which he is a part, will apply for Channel 244A if it is allotted to Pine Hill, as requested.

2. We believe the public interest would be served by proposing the allotment of Channel 244A to Pine Hill, Alabama, since it could provide a first local aural transmission service to the community.

Technical Statement

3. A staff analysis has determined that Channel 244A can be allotted to Pine Hill consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, provided the transmitter therefor is located at least 6.2 kilometers (3.9 miles) northwest of the community at coordinates North Latitude 32-01-38 and West Longitude 87-37-23.[1] The site restriction is required to avoid a short spacing to the authorized site for Station WJUS(FM), Channel 243C, Fort Walton Beach, Florida, at coordinates North Latitude 30-45-04 and West Longitude 86-42-38.

4. We believe the public interest would be served by proposing the allotment of Channel 244A to Pine Hill, Alabama, since an interest has been expressed in providing that community with its first local aural transmission service. Therefore, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, to include Pine Hill, Alabama, as follows:

	Channel No.	
City	Present	Proposed
Pine Hill, Alabama	–	244A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **September 1, 1994**, and reply comments on or before **September 16, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

R. J. Miller
Route 1, Box 242
Letohatchee, AL 36047

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who

[1] Petitioner proposed a transmitter site located 8.4 kilometers (5.2 miles) northwest of Pine Hill at coordinates North Latitude 32-01-24 and West Longitude 87-39-40. However, in determining compliance with Section 73.207(b) of the Commission's Rules, if a new proposed allotment requires a site restriction, the Commission will endeavor to impose that which is the least restrictive theoretical site from the intended community of license. *See Fort Myers, Florida*, 3 FCC Rcd 2671 (1988). It is not until the application stage that the actual availability of a particular site is demonstrated. *See West Palm Beach, Florida*, 3 FCC Rcd 5810 (1988).

filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-510

In re Applications of

RAMON RODRIGUEZ AND ASSOCIATES, INC. — File No. BPH-821208AA

DAVID ORTIZ RADIO CORPORATION — File No. BPH-830722AL

For a Construction Permit
for a New FM Station
Lajas, Puerto Rico

Appearances

Christopher D. Imlay, Esq. on behalf of Ramon Rodriguez and Associates; and *Robert A. DePont, Esq.* and *Christopher J. Reynolds, Esq.* on behalf of David Ortiz Radio Corporation.

SUPPLEMENTAL DECISION

Adopted: June 21, 1994; Released: July 11, 1994

By the Review Board: MARINO (Chairman) and GREENE.

Board Chairman MARINO:

1. This case returns to the Review Board following a trial type evidentiary hearing in response to the remand in *David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253 (D.C. Cir. 1991). For the reasons set out below, we affirm Administrative Law Judge John M. Frysiak's (ALJ) *Supplemental Initial Decision* (*S.I.D.*), 8 FCC Rcd 2461 (1993).

BACKGROUND

2. In a previous incarnation of this comparative broadcast proceeding, the Commission affirmed ALJ and Review Board decisions awarding the construction permit to Ramon Rodriguez and Associates, Inc. (Rodriguez). *Ramon Rodriguez and Associates, Inc.*, 5 FCC Rcd 4041 (1990). The Court, however, found that material questions were raised concerning whether Rodriguez concealed the loss of its antenna site from the Commission and whether a principal of the applicant posed as a Commission employee. It therefore remanded the proceeding for further consideration of Rodriguez's qualifications to be a licensee. *David Ortiz Radio Corp. v. FCC, supra.* On remand, the Commission identified the substantial and material questions of fact which were raised in this regard, but also found that serious character questions existed concerning the qualifications of David Ortiz Radio Corp. (Ortiz) which also warranted further hearing. *Ramon Rodriguez and Associates, Inc.*, 7 FCC Rcd 2633 (1992). Accordingly, it specified the following issues (*Id.* at 2634):

> (i) To determine whether Ramon Rodriguez and Associates, Inc. made material misrepresentations in certifying to the Commission that it had reasonable assurance of the availability of its specified transmitter site in its March 18, 1983 amendment and its July 7, 1983 reinstatement of its original proposal.
>
> (ii) To determine whether Juan Carlos Rodriguez Maldonado abused the Commission's processes by impersonating an FCC employee and whether Ramon Rodriguez and Associates, Inc. submitted false sworn statements with respect to this matter.
>
> (iii) To determine whether David Ortiz offered Jorge Morales Gonzague a position of employment at station WMIO(FM), Cabo Rojo, Puerto Rico, and whether Ortiz Radio Corporation submitted a false sworn statement with respect to this matter.

And two conclusory issues (iv) and (v) about the basic qualifications of Rodriguez and Ortiz were also specified.

3. In the *S.I.D., supra*, the ALJ resolved the site representation and impersonation issues designated against Rodriguez in its favor and resolved the character issue regarding Ortiz against it. Therefore, the ALJ again granted Rodriguez's application. The proceeding is now back before the Board on Ortiz's exceptions to the *S.I.D.*, as well as a petition to enlarge issues filed by Ortiz on September 8, 1993 and responsive pleadings by Rodriguez. We have examined the *S.I.D.* in light of the supplemental record and pleadings and conclude that the grant to Rodriguez should be affirmed. Oral argument was previously held in this proceeding and we find it would not materially assist our review of this case to grant Ortiz's request for another argument.

4. Before turning to the individual issues, we observe that this case, involving as it does questions of the respective applicants' basic character qualifications, *i.e.*, misrepresentation and abuse of process about Rodriguez, and misrepresentation about Ortiz, necessarily turns in large measure on an evaluation of witness credibility. In this regard, the ALJ, in accordance with his customary prerogative, endeavored to make credibility findings under each issue and with respect to the testimony of all the important witnesses. Because the ALJ is the only adjudicative official to observe the witnesses' testimony, his findings are by law entitled to great weight and considerable deference. *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). The Board may not upset these findings unless such reversal is supported by substantial evidence. *WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1141-42 (D.C. Cir. 1985). Moreover, the ALJ's credibility findings take on added importance here because the issues were added in large part based on direct conflicts and contradictions in statements submitted to the Commission and these different versions of events are reflected in the testimony. Indeed, in remanding this case to the Commission, the court stressed the traditional importance of providing an opportunity for the trier of fact to observe witness demeanor in order to resolve conflicts that may "appear irresolvable on paper" and determine "which of several conflicting accounts is accurate." *David Ortiz Radio Corp. v. FCC*, 941 F.2d at 1261. For these reasons, and

pursuant to the court's dictate, we have accorded the ALJ's findings, which conscientiously seek to sort out the truthfulness in the varying accounts, considerable weight in reviewing the "cold record" before us. *See WEBR, Inc. v. FCC*, 420 F.2d 158, 162 (D.C. Cir. 1969).

I. RODRIGUEZ MISREPRESENTATION ISSUE

5. The first issue is whether Rodriguez intentionally concealed the loss of its transmitter site from the Commission in an amendment filed March 18 and a letter withdrawing the amendment filed July 7, 1983. Ramon Rodriguez Guzman, the applicant's president and 50% owner, was in charge of locating the applicant's transmitter site, and his testimonial description of his actions was summarized by the ALJ as follows.

6. Before specifying a site at Cerro Guaniquilla in the application filed on December 8, 1982, Guzman was told by residents of the area that the land was government-owned and this information was confirmed by employees of the Natural Resources Agency in Buqueron, who indicated that the land would be available for use as a transmitter site. Thus, to secure use of the site, Guzman visited the Agency's San Juan office where he made application for land use and paid a fee for a permit. When no action was taken on his application, however, Guzman made inquiries and was informed in December 1982 by John A. Stewart of the Agency that the land did not belong to his department but was actually private property. Thereupon, Guzman revisited the area to find the owner and, in the course of searching the land records at the Office of the Registry in Mayaguez, learned that the lands in question were government-owned after all. He once again made inquiry at the Natural Resources Agency where he was told by Myrna Robles that the land could belong to the Conservation Trust of Puerto Rico. After numerous other unsuccessful attempts to get information, on January 10, 1983, Guzman visited Francisco Javier Blanco, Director of the Conservation Trust, who told him that the site was under the Conservation Trust's jurisdiction but was unavailable for transmitter use because it was to be developed as a bird sanctuary. On the same day, however, Guzman's brother, David Rodriguez, who had met with Puerto Rican Forestry Division representatives at Punta Guaniquilla to determine who owned the site, also informed him that he had been told the land belonged to Codremar, a subsidiary of the Natural Resources Agency, which was unconnected to the Conservation Trust. Rodriguez Remand Exh. 1; Rodriguez Remand Exh. 1, Attachment A; *S.I.D.*, ¶ ¶ 3-5.

7. Because he had received at least four conflicting views as to ownership of the Cerro Guaniquilla site -- namely, that it belonged to the Natural Resources Agency, the Codremar, the Conservation Trust of Puerto Rico, or was privately owned -- and because he knew the Mayaguez land records were five years out of date, Guzman did not consider Blanco's statement that the site was unavailable to be definitive. He also knew that Ortiz had specified the same site, as had Minority Broadcasting, a now-dismissed applicant, and believed that if the site was available to the other applicants, it was available to Rodriguez. For these reasons, Rodriguez continued to specify the Cerro Guaniquilla site but because of the confusion Guzman continued to meet with other Natural Resources representatives such as Angel David Gonzales and a Mr. Francisco to determine the actual ownership. Rodriguez Remand Exh. 1; tr. 648; *S.I.D.*, ¶ 6.

8. In March 1983, Rodriguez amended its application to specify Boqueron as its community of license because Rodriguez then believed the case would turn on a comparison of communities and Boqueron had no local station. The amendment's engineering exhibit simply restated the Cerro Guaniquilla site because of the belief the site was still available. In May, however, after the city of license matter was reconsidered, Rodriguez decided that Boqueron should not be specified, but only proposed for secondary service, and counsel was instructed to withdraw the amendment which had not yet been acted on. This was accomplished on July 7, 1983. In June 1983, because of the continuing uncertainty as to the Cerro Guaniquilla site ownership and because engineering counsel had urged locating a better site for coverage purposes, Guzman sought and obtained a new site. The amendment specifying the new site was filed in August 1983. Rodriguez Remand Exh. 1; *S.I.D.*, ¶ ¶ 7-10.

9. The ALJ accepted Guzman's testimony as truthful. Rehearsing the recitation of events described in that testimony and summarized above, the ALJ found that Guzman's actions after January 10, 1983 indicated that he doubted the accuracy of Blanco's statement. Specifically, the ALJ noted, Guzman continued to attempt to ascertain the site's ownership, he knew the land records were out of date, and there was no evidence that Blanco had stated any basis for his assertions. Contemporaneous filings by the other applicants -- FM Minority on April 20 and Ortiz on July 22 -- at the same site confirmed Guzman's view, the ALJ stated. The ALJ also noted that subsequent events bore out Rodriguez's position. Specifically, in an October 1985 amendment to change site, Ortiz reported that the Cerro Guaniquilla site, assumed to be owned by a private individual, was in fact owned by one Mr. Ramirez who sold the land a few months before July 1985. Finally, the ALJ concluded, because Rodriguez could have amended as a matter of right during the time period in question had it believed the site was lost, it had no motive to conceal or purpose to mislead the Commission. *I.D.*, ¶ ¶ 45-47.

10. We defer to the ALJ's credibility findings, which are not contradicted by other substantial evidence in the record, and conclude that Rodriguez did not misrepresent the availability of its site. The credibility determination here does not depend on which of two conflicting witness accounts is true, but rather on whether the testimony of a single witness is believable. As a legal matter, we believe the ALJ's evaluation of Guzman's credibility should be entitled to no less weight than it would be had there been conflicting witness accounts. *See generally TeleSTAR, Inc.*, 2 FCC Rcd 5, 12-13 (Rev. Bd. 1987), and cases cited therein (subsequent history omitted).

11. We agree with the ALJ's determination that Guzman's description of the events before and following his meeting with Blanco was credible. There was no other testimony to contradict that account. Although evidence was introduced by Ortiz to show that one of the named individuals allegedly contacted by Guzman in 1983 did not work for the government agency in question at that time, a fair reading of Guzman's testimony in this regard shows that he was somewhat confused in remembering the precise date of the instance in question because numerous contacts occurred at various government departments ten years earlier, and he may have spoken to Codremar government representatives at some later date (*see* tr. 624-34). But there is no substantial evidence that his overall account was a fabrication nor testimony from any other witness to con-

tradict Guzman's description. Uncontradicted testimony which is not itself inherently incredible is entitled to belief. *See Key Broadcasting Corp.*, 60 FCC 2d 575, 577 (1976); *Voice of Reason*, 37 FCC 2d 686, 700 (Rev. Bd. 1972) (quoting *United Church of Christ v. FCC*, 425 F.2d 543, 549 (D.C. Cir. 1969)).

12. Moreover, there is other record support for Guzman's basic contention that although ownership of the site was in question, it was not unreasonable for him to continue to believe the site was still available or at least that Blanco was not the last word on the subject. That is, both his competitors were specifying the identical site in repeated application filings during the same time period.[1] There is also ample evidence, which is not disputed, that prior to meeting with Blanco in January 1983 Guzman made numerous unsuccessful attempts to identify and locate the site owner (and there is no question that Rodriguez's initial site representation was truthful, *see David Ortiz Radio Corp., supra*, 941 F.2d at 1258-9), and his account of events, including his meeting with Blanco, is consistent with that previous experience -- namely, that the question of ownership was terribly if not hopelessly confused. Nor is there any evidence to contradict Guzman's claim that he had information indicating at least four possibilities as to ownership, and that one of these accounts was contemporaneous with the contradictory information received from Blanco.

13. Ortiz also argues that Guzman inconsistently stated prior to the remand hearing that he "immediately" moved to seek a new site after meeting with Blanco, but later claimed at the remand hearing that he did not secure a new site until June 1983. This seeming contradiction was clarified in Guzman's testimony, where he explained that the word he used in his earlier statement simply meant to convey what he would do next rather than to connote he acted "without delay." *See* tr. 650-51. This semantic difference derived from the fact that Guzman does not read English. Tr. 618. He further clarified that his actions after January 10 were to investigate other sites but, primarily, to continue to seek out the owner of the same site because he was not satisfied with Blanco's information. Tr. 648. He reached this conclusion because of the confusion as to the site's ownership, his knowledge that both of Rodriguez's competitors had chosen the identical site, and the faulty state of the Mayaguez property records. *Id.;* tr. 658-60.[2] We therefore conclude that the repetition of the site in the March 18 amendment proposing to change the city of license and the July 7 letter withdrawing the proposed amendment reflected a good faith belief that it was not unreasonable to think the site was available even though its ownership was in question. There must be a clear showing of deceptive intent to support a finding of misrepresenttion, *see Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983), and, in its absence, the bare existence of a mistake in an application does not constitute disqualifying conduct. *See Ramon Rodriguez and Associates, Inc.*, 7 FCC Rcd at 2633; *MCI Telecommunications Corp.*, 3 FCC Rcd 509, 512 (1988); *Kaye-Smith Enterprises*, 71 FCC 2d 1402, 1415 (1979). In sum, in view of all these circumstances, we hold that the ALJ's acceptance of Guzman's testimony as credible should be affirmed and the issue resolved in Rodriguez's favor.

II. RODRIGUEZ ABUSE OF PROCESS ISSUE

14. Issue II is based on allegations by Ortiz that Juan Carlos Rodriguez Maldonado, the son of the applicant's 50% owner, a 1% shareholder and proposed station employee, impersonated an FCC employee in order to gain evidence against Ortiz. Ortiz's direct case consisted of the declaration of Ortiz Postigo, a photographer and owner of Carlitos Photo Store in Cabo Rojo, Puerto Rico, which reaffirmed his prehearing declarations of March 28 and May 20, 1988. Postigo's declarations asserted that Maldonado, accompanied by another individual, came to his store in February 1988 and requested that photographs be taken of WEKO(AM), in Cabo Rojo, which is owned by Ortiz. Postigo asked if Maldonado had the permission of David Ortiz, the station owner, to take such photographs and, when Maldonado responded that such permission was not needed, Postigo refused the request. Postigo stated that Maldonado returned to his store later that day and claimed he was from the FCC and wanted to ask questions about WEKO and WMIO(FM), which is owned by David Ortiz's daughter, Maria I. Ortiz-Aviles. Postigo said he asked Maldonado for identification and when none was produced, he declined to answer any questions. Ortiz Remand Exh. 8, Att. 1; *S.I.D.*, ¶ ¶ 11-14.

15. Maldonado testified that he visited the photo shop for the purpose of having pictures taken of the WEKO(AM) antenna in order to estabish that WEKO(AM) and WMIO(FM) were under the same roof and that the microwave line for the FM station was located on the AM tower. Accompanied by a friend, Juan N. Esquerado, he also described the first visit to the shop as terminating when Postigo refused to take the pictures after Maldonado in-

[1] Although Ortiz states that the ALJ's factual premise is erroneous because its 1985 amendment actually pertained to ownership of a property located a short distance from Punta Guaniguilla, the ALJ's ruling upon which Ortiz relies for this argument (*Memorandum Opinion and Order*, FCC 88M-1096, released April 13, 1988) does not support the conclusion that Ortiz was specifying a site different from that of Rodriguez. The ALJ is correct on the key finding that the applications of Ortiz, Rodriguez, and FM Minority all specified the identical site. As stated by FM Minority in its application: "The proposed site is exactly the same site proposed by David Ortiz Radio Corp. and Ramon Rodriguez & Associates which this application is mutually exclusive with." FM Minority Broadcasting, Form 301, filed April 20, 1983, Engineering Statement (Official notice taken.) Moreover, Ortiz did not challenge Guzman's testimony that Rodriguez had specified the same site as had its opponents. Thus, the ALJ's finding that Rodriguez placed reliance on the specification of the same site by its opponents is not undermined in this respect.

[2] We also disagree with Ortiz that Rodriguez improperly relied on "new facts" at hearing which it did not state prior to the remand, such as the meeting between David Rodriguez and Forrestry Division officials, to explain its conduct. Rodriguez, faced with the specification of a misrepresentation issue based largely on the January 10 statement of Blanco that its site was lost, was entitled and, indeed, obligated to fully explain the circumstances under which it represented the continued availability of its proposed site. These explanations were directly responsive to the Commission's concerns in specifying the issue and Ortiz had a full opportunity at hearing to cross-examine Guzman and to present other evidence to test his explanations. Thus, its argument in no way undermines the ALJ's conclusions as to the credibility of Guzman's testimony.

formed him he did not need the station owner's permission. On the second visit, Maldonado stated, he informed Postigo that he was associated with Rodriguez, that Rodriguez had a case at the FCC involving a radio license, and that he needed pictures to prove that the same person "had two stations in the same place." He also stated that he informed Postigo he was a singer with the well-known Andino's Trio and that Postigo admitted his face was familiar. Rodriguez Remand Exh. 2; *S.I.D.*, ¶ ¶ 18-19.

16. Esquerado testified that he was asked to accompany Maldonado to Cabo Rojo so that he could verify the information obtained from investigation of the Ortiz family radio stations. Esquerado's account mirrors Maldonado's description of both visits to the photo shop, and Esquerado also testified that Maldonado never claimed that he was an FCC employee or representative during the visits, or implied as much. Rodriguez Remand Exh. 3; *S.I.D.*, ¶ 20. For his part, Postigo denied that Maldonado identified himself as being associated with Rodriguez or as a member of Andino's Trio, or that he recognized him. Ortiz Remand Exh. 8, Att. 2; *S.I.D.*, ¶ 15.

17. In addition to the written testimony of Postigo, Maldonado, and Esquerado outlined above, the ALJ also reviewed the oral and deposition testimony of Postigo, which he found to be in conflict with his written testimony. Thus, for example, although Postigo stated in his May 28, 1988 declaration that he was unfamiliar with the Andino's Trio, at hearing he said he had heard of the group before May 1988. Tr. 710, 730; *S.I.D.*, ¶ 16. Although he denied at deposition that he'd been given a copy of his March 28, 1988 declaration, at hearing he admitted receiving it. Tr. 713-14; *S.I.D.*, ¶ 16. Although Postigo's May 28, 1988 declaration states that Maldonado represented himself as an FCC employee, at deposition Postigo said Maldonado did not use the word "employee." At hearing, Postigo said he is "not using that word [employee] now either." He also admitted he did not recall the specific words Maldonado used but he claimed it was "something like he was part of, or an employee of," or that he was "from the FCC, an agent of FCC," or that Maldonado "told him something related to the fact." At deposition, Postigo said he did not "recall the word he used first, it was something about the Federal Communications Commission," and that he did not recall the exact words used by Maldonado to indicate his identity. Tr. 695-98; *S.I.D.*, ¶ 17.

18. On the basis of the evidence summarized above, the ALJ found that "[b]ecause Postigo is inconsistent in his testimony, it is deemed his testimony on this issue is not trustworthy of belief." *S.I.D.*, ¶ 48. He further found that Postigo had a motive to help Ortiz because the record established that he is a cousin of David Ortiz and advertises on WEKO. *Id.* at ¶ 52. The ALJ held that "it is clear that Postigo is not certain of the facts" and that "his recollection was affected by his desire to help his relative David Ortiz." *Id.* at ¶ 54. By contrast, the ALJ found that "Maldonado was straight forward in his testimony" and that "Maldonado and Esquerado's testimonies are credible." *Id.* at ¶ ¶ 53-54. Although Ortiz excepts to the ALJ's evaluation of the witnesses, we defer to the ALJ's credibility findings which are supported by a preponderance of record evidence.

19. It is apparent from the foregoing factual recitation that there is insufficient record evidence to establish that Maldonado impersonated an FCC employee. The only witness to support this allegation was himself uncertain and self-contradictory in his testimony on the key question of what Maldonado actually said about his relationship to the FCC on his return visit to the photo store. Both Postigo's deposition and hearing testimony flatly contradicted his earlier claims in his declarations that Maldonado had used the word "employee" to describe himself at the time of his visit. Postigo's deposition testimony that what Maldonado had said was something about the FCC is in fact consistent with Maldonado's testimony that he explained the purpose of his visit as relating to an FCC case in which he was interested and needing photographs in connection with a radio station. That it is unlikely Maldonado was posing as an FCC employee is also supported by the facts that he is a member of a well-known singing group in Puerto Rico and could be recognized, that Postigo admitted at hearing that he knew the group, and that both Maldonado and Esquerado testified that Postigo said at the time of the visit that Maldonado looked familiar.

20. In addition, it is difficult to see why Maldonado would wish to impersonate an FCC employee to establish his authority to obtain the photographs when, as all parties agreed in their testimony, Maldonado said at the time that no special permission was needed to take pictures of a radio station. And Maldonado's explanations of the incident are clear and fully corroborated by Esquerado, whereas Postigo's recollection is at best hazy. For example, at deposition, Postigo testified:

> Q. When you say he later returned and he stated he was from the FCC exactly what did he say?
>
> A. That I am an agent of the FCC and I asked him to give me some identification.
>
> Q. You said he said he was an agent of the Federal Communications Commission?
>
> A. I don't remember the word he used first. It was something about the Federal Communications Commission.
>
> Q. Do you remember exactly -- do you remember the words that he used in indicating his identity?
>
> A. No, I don't remember.

Rodriguez Remand Exh. 7, p. 32.

> Q. Did he say employee or not?
>
> A. No, but why did I ask for identification?
>
> Q. He didn't say employee?
>
> A. I don't remember.

Id. at 63.

21. Given these circumstances, we believe the record evidence strongly supports the ALJ's credibility findings on each of the three witnesses and requires the resolution of the abuse of process issue in Rodriguez's favor. In an apparent effort to overcome the weakness of its evidentiary showing, Ortiz notes that the court observed in its remand opinion that Maldonado concealed his identity and association with Rodriguez when he visited WMIO (AM) to request its public file. We cannot find that the incident referred to reflects adversely on Maldonado's credibility because it is not developed on the record and is not part of the specific issue designated by the Commission which pertains only to whether Maldonado abused Commission

processes by impersonating an FCC employee at the photo shop. The Board is bound by the scope of the issues as defined by the Commission and limited to the hearing record made pursuant thereto.

III. ORTIZ MISREPRESENTATION ISSUE

22. Issue III derives from an assertion by one Jorge Morales Gonzague, a third party, that David Ortiz, who is president and majority owner of Ortiz, offered him the position of Director of Programming at WMIO (FM), the station owned by Mr. Ortiz's daughter in Cabo Rojo. David Ortiz denied Morales's allegations and the conflict in sworn statements filed with the Commission led to specification of the issue. In context, Rodriguez, which submitted Morales's statement to the Commission, was attempting to show, in a series of petitions, that David Ortiz was the real party-in-interest in station WMIO (FM), but the issue added was limited to the matter specified.

23. According to Morales, the following events transpired. Morales was working in 1988 for Miguel Deynes Soto, a Puerto Rican Commonwealth senator, who asked him to go to WEKO (AM) to acquire an audio tape of a speech made by Puerto Rican Governor Rafael Hernandez Colon in favor of Soto's candidacy. Morales telephoned the station and spoke to David Ortiz who told him to pick up the tape in person. Upon visiting the station on March 2, Morales met with Wilkins Ortiz, David Ortiz's son, who gave him the tape, and then spoke with David Ortiz in his office. Morales had previously worked with David Ortiz at a radio station network, Network Notiuno, where Ortiz was the director and Morales a news announcer. During their conversation, Ortiz offered Morales a job at WMIO (FM) and, subsequently, on April 18, by telephone, he formally offered him the job of director of programming. Morales initially accepted the offer and was to return to WEKO (AM) on April 25 or 26 to work out details, but having "heard some stuff that was on the cloudy side," Morales did not keep the appointment and decided to continue to work for Senator Deynes Soto. Rodriguez Remand Exh. 4; tr. 756-7, 762-4, 768, 774-5, 777; *S.I.D.*, ¶ ¶ 25, 27.

24. Morales further stated that on May 9, 1988, one week after his affidavit reporting the job offer was filed with the Commission, he received a visit at his office from one Manuel Feliciano, who identified himself as a private investigator and president of the Caribbean Detective Bureau and Academy, Inc. Feliciano was vague as to the purpose of the visit but indicated that it concerned a "conflict over some radio stations, one in Cabo Rojo and other persons"; that he was interested in knowing Morales's movements; and that he was approaching him because the person he represented was "very nice ... and didn't care for money." Feliciano declined to name the person in question but Morales believed he was referring to David Ortiz. Feliciano did not keep an appointment made for the next day to continue the discussion. Rodriguez Remand Exh. 5; *S.I.D.*, ¶ 26.

25. David Ortiz denied that he offered a job to Morales at his daughter's station or that he had any control over that station. According to Ortiz, Morales called his station several times in March 1988 and then, about a week after the last call, visited the station and unannounced entered Ortiz's office. Ortiz said Morales expressed an interest in working at Ortiz's proposed FM station, but Ortiz told him he had no job to offer him and Morales then left. Ortiz stated he had no further contact with Morales and that Morales did not inquire about the tape of Governor Colon's speech favoring Senator Deynes Soto's candidacy. Ortiz Remand Exh. 9; *S.I.D.*, ¶ ¶ 21-24. Ortiz also initially stated that he had met Morales on only that one occasion and that he was never employed by the Notiuno Network, but later stated that WEKO was an official link in the Network and had been a Notiuno affiliate for fourteen years. Tr. 839-40, 843, 885-86; Rodriguez Rebuttal Exh. 6, p. 4; *I.D.*, ¶ ¶ 29-30.

26. As to Feliciano, the private investigator, Ortiz testified at hearing that he had hired him out of concern for his personal safety. He said he wanted to know if Morales had any criminal record that should be reported to the FCC, and was worried because of the way Morales had burst into his office. He was also concerned because he did not know why Morales visited him. Tr. 883-4, 895, 897; *S.I.D.*, ¶ 37. At deposition, however, Ortiz claimed he had hired Feliciano only to find out "what kind of person" Morales was. Rodriguez Remand Exh. 6, p. 34; *S.I.D.*, ¶ 37. In an exhibit submitted after the hearing, Ortiz stated that he hired Feliciano to seek information regarding Morales "as a result of the allegations Morales had made about [Ortiz]," but he denied authorizing Feliciano to offer money to Morales. Ortiz Rebuttal Exh. 4; *S.I.D.*, ¶ 38.

27. In both his deposition and oral testimony, David Ortiz repeatedly stated that WEKO never broadcast a program that contained any speech by Governor Colon. He also stated that his staff and he personally checked the logs for the month of February 1988 to verify this. David Ortiz's son, Wilkins Ortiz, testified that he had not seen Morales at WEKO and did not give him a tape of WEKO broadcasting Governor Colon's speech. Ortiz Remand Exh. 9; tr. 834-5, 862, 864-5, 880, 908-9, 918; *S.I.D.*, ¶ 31.

28. Beyond the written and oral testimony summarized above, the ALJ also examined documentary evidence which appeared to establish that, despite Ortiz's denials, WEKO aired a speech in early February 1988 in which Governor Colon endorsed Senator Deynes Soto. Thus, one Hector Colon, who is affiliated with the Popular Democratic Party, provided the following sworn statement:

> That on the 7th day of February, 1988, I was present at the activity of the Popular Ladies at the Sports Palace of Mayaguez, Puerto Rico, which program was transmitted through WEKO radio station of Cabo Rojo. On that day the Governor of Puerto Rico, the Honorable Rafael Hernandez Colon addressed the persons in attendance and in his message he endorsed various candidates of his party and amongst which there was the Senator Miguel Deynes Soto. An invoice dated February 5, 1988, in the amount of $635.00, and another in the amount of $205.00 for a total of $840.00, sent by the radio station WEKO, were paid by our party with check number 010245.

Rodriguez Rebuttal Exh. 5; *S.I.D.*, ¶ 32. Ortiz objected at the hearing to the admission of Hector Colon's sworn declaration because it did not have an opportunity to cross-examine him. The ALJ allowed the exhibit with the understanding that Ortiz could move to depose Colon and, then, if warranted, move to strike the exhibit. Tr. 882-3. Instead of moving to cross-examine Colon by deposition, however, Ortiz sought to introduce a new exhibit containing a declaration of David Ortiz which stated for the first time that WEKO did broadcast a speech by the governor but that it did not contain an endorsement of the senator. A short,

two page excerpt from the broadcast was attached. The ALJ properly rejected the proffered exhibit because Ortiz never sought to depose Mr. Colon and its selected submission was a small, incomplete portion of the lengthy broadcast in question. *See* FCC 92M-1054, released November 24, 1992.

29. In addition to Colon's statement, two official station WEKO bills bearing the stamped signature of David Ortiz for transmissions from the Sports Palace in Mayaguez were introduced. The first was addressed to the Popular Democratic Party, attention Hector Colon, and was for a 42 minute broadcast of the assembly of Popular Ladies on February 7, 1988, and the second was addressed to the Popular Ladies for a two hour transmission on February 7. Rodriguez Rebuttal Exhs. 1, 4; *S.I.D.*, ¶ ¶ 33-4. Evidence of payment for the broadcasts by the Popular Democratic Party was also introduced. Rodriguez Rebuttal Exh. 3; *S.I.D.*, ¶ 34. The WEKO program logs for February 1-14, 1988 also show the Popular Ladies broadcast from 11:00 a.m. to 1:44 p.m. on February 7. Ortiz Rebuttal Exh. 2, pp. 6, 10; *S.I.D.*, ¶ 36. Finally, David Ortiz filed, as required, a signed and notarized sworn statement on March 9, 1988 with the Puerto Rican State Electoral Commission listing all political broadcasts aired by WEKO during February 1988. Tr. 853. The attached report form, which Ortiz signed and "double checked," listed the Popular Ladies broadcast for 2 hours and 42 minutes on February 7, 1988, for which $840 was charged and paid for by the Party. *S.I.D.*, ¶ 35.

30. The ALJ concluded that Morales's testimony that Ortiz offered him a job at WMIO (FM) was "entirely credible." He noted that Morales reported the job offer to the Commission only after a chance meeting with Maldonado who told him David Ortiz did not own Station WMIO. It was after learning the job offer had been reported to the Commission, the ALJ found, that Ortiz hired a detective to investigate Morales. The ALJ further found that Ortiz's statement that he hired Feliciano because he feared Morales as a result of the latter's visit to his station was "simply incredible" because Feliciano was hired two months after Morales visited WEKO. The ALJ also noted the inconsistency between Ortiz's initial denial of any personal connection with Network Notiuno where Morales worked and his later admission that WEKO was a Network Notiuno affiliate for fourteen years. Finally, the ALJ found that the record established that Ortiz "knew or should have known" that his representations that the tape Morales sought did not exist and that no speech by Governor Colon was aired in February 1988 were false. The ALJ concluded that "neither David Ortiz nor his son Wilkins' testimony is credible;" that they misrepresented facts to the Commission concerning events which transpired between Morales and Ortiz; "that Morales' testimony is credible and fully credited;" that Ortiz did offer a job to Morales at WMIO; and that David Ortiz's misrepresentations required denial of Ortiz's application. *S.I.D.*, ¶ ¶ 55-59. In its exceptions, Ortiz complains that Morales's testimony was not credible and lacked corroboration. Again, however, we believe the record evidence supports the ALJ's conclusions.

31. As was the case with the preceding issue, the ALJ's credibility findings take on dominant weight because the Board is otherwise faced with the task of choosing between two diametrically opposed versions of events. Moreover, and unlike the previous inquiry, the record here provides ample documentary evidence in support of the ALJ's credibility findings. Thus, the record supports the ALJ's joint conclusions that Morales's version of the job offer is true and that Ortiz's denials are false. Furthermore, we believe that the ALJ properly rejected Ortiz's explanations not only with regard to the job offer, but also with respect to the hiring of Feliciano, the private investigator, and, most importantly, with regard to whether or not the station owned by Ortiz carried the political broadcast which was central to the entire dispute.

32. That Morales's explanations of the purpose of his visit to WEKO and the events that transpired there are credible is supported by the following documents in the record: (1) the sworn statement of Hector Colon, an impartial, non-party witness, that the political speech and endorsement in question occurred, just as Morales claimed; (2) the WEKO station bills addressed to Colon for the broadcast in question; (3) the cancelled checks paid to WEKO by the Democratic Popular Party for the broadcast; and (4) David Ortiz's signature double checking the official submission to the Puerto Rican Elections Commission verifying that his station carried the political broadcast, despite his repeated testimonal denials that this was the case. The record thus is very clear and supportive of the ALJ's conclusion that Ortiz's sworn statements that WEKO did not broadcast the governor's speech, that there was no tape of the speech, and that Morales never requested the tape are patently false and disqualifying. *See Richardson Broadcast Group*, 7 FCC Rcd 1583 (1992), *aff'd by judgment sub nom. Younts v. FCC*, No. 92-1119 (D.C. Cir. May 10, 1993); *Evansville Skywave, Inc.*, 8 FCC Rcd 7009 (Rev. Bd. 1993), *rev. denied*, FCC 94-125, released June 6, 1994; *KQED, Inc.*, 3 FCC Rcd 2821 (Rev. Bd. 1988), *rev. denied*, 5 FCC Rcd 1784 (1990), *aff'd mem. sub nom. California Public Broadcasting Forum v. FCC*, 947 F.2d 505 (D.C. Cir. 1991).)

33. Moreover, the ALJ also properly concluded that Ortiz's testimony regarding his reasons for sending Feliciano to see Morales lacked credibility. Not only did Ortiz's explanations appear to vary -- *e.g.*, he wished to know if Morales had a criminal record, he wanted Morales investigated because of the allegations he had made against Ortiz, he was fearful because of the way Morales allegedly "burst" into his office, -- but his principal contention that he was concerned for his safety does not explain why he waited a full two months after Morales's visit to WEKO to act, or the fact that Feliciano's visit to Morales occurred only one week after Morales's allegations were filed with the Commission. The sequence of these events suggests strongly that the *coup de foudre* that motivated Ortiz to dispatch Feliciano to investigate Morales was the recent Commission filing raising serious questions about Ortiz's qualifications. Although Ortiz objected at the hearing, and now excepts, to the ALJ's admission of Morales's declaration describing his conversation with Feliciano as hearsay in the absence of testimony by Feliciano himself, the ALJ properly noted that this was appropriate rebuttal evidence because Ortiz testified he hired Feliciano out of concern for his personal safety and Ortiz's credibility was central to the remanded issue. Tr. 740-744. Hearsay, where relevant and material, is admissible in administrative proceedings. *See Lee Optical*, 2 FCC Rcd 5480, 5485-6 (Rev. Bd. 1987) (and cases cited therein).

34. In sum, the documentary and testimonal evidence of record, beyond the stark conflict between Morales and Ortiz as to whether or not a job offer was made, clearly supports the plausibility of Morales's statements and undermines Ortiz's denials. The ALJ's credibility findings are thus reasonable and supported by substantial record evidence. *See Capitol City Broadcasting Co.*, 8 FCC Rcd 1726,

1736 (Rev. Bd. 1993), *remanded on other grounds*, FCC 93-514, released December 7, 1993. We affirm his resolution of the misrepresentation issue against Ortiz.

IV. ORTIZ PETITION TO ENLARGE ISSUES

35. On September 8, 1993, Ortiz moved to add an *ex parte* issue against Rodriguez. Ortiz's request is premised on a letter, dated August 9, 1993, from Julian P. Freret, counsel to Rodriguez, to Dennis Williams, Chief, FM Branch, Audio Services Division, Mass Media Bureau. According to Ortiz, the letter (attached to its Petition as Exhibit 1) referred to the construction permit issued to Rodriguez in this proceeding and stated that:

> Local authorities in Puerto Rico have expressed a reluctance to extend building permits, etc. in the absence of assurance from the Federal Communications Commission that Ramon Rodriguez & Associates, Inc. holds a valid construction permit for the Lajas station. As you are undoubtedly aware, §9(b) of the Administrative Procedure Act (5 U.S.C.A. §558(c)) provides that when an applicant has made timely and sufficient application for renewal or new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.
>
> Accordingly, it is respectfully requested that you direct a letter to this office for transmittal to appropriate Puerto Rican authorities confirming that Ramon Rodriguez & Associates, Inc. has a valid construction permit for a new FM broadcast station at Lajas, Puerto Rico. A suggested draft of such a letter is attached hereto.

Ortiz asserts that a copy of counsel's letter was not served on it. Petitioner further maintains that, on December 24, 1992, it had filed a pleading with the Commission, styled Emergency Petition for Rescission of Construction Permit, moving for revocation of the Commission's action of September 22, 1992, which extended until March 23, 1993 Rodriguez's authority to construct the station. When Rodriguez sought a further extension of construction on March 22, 1993, Ortiz opposed that request in a pleading filed April 9, 1993. Accordingly, Ortiz argues, counsel's August 9, 1993 letter goes to the issue of whether Rodriguez has a valid construction permit and raises questions of potential violation of 47 CFR §§ 1.1202 and 1.1208 governing *ex parte* presentations during a restricted proceeding.

36. In opposition to Ortiz's petition, Rodriguez states initially that its construction permit was issued by the Commission on February 12, 1991 and that it has proceeded to construct the station. It asserts, however, that although it obtained the necessary building permits from local Puerto Rican authorities to complete construction, counsel for Ortiz wrongfully informed these officials that Rodriguez did not have a valid construction permit from the Commission. Because it understood that it would need to establish the continuing validity of its construction permit to satisfy local authorities, Rodriguez claims, its counsel approached the Commission's FM Branch in writing for a statement confirming the validity of its permit. It further states that in reply to counsel's August 9 letter, the FM Branch responded by letter dated August 20 (Petition, Exhibit 2) that:

> In response to your request of August 9, 1993, this letter confirms that the Commission granted to Ramon Rodriguez & Associates a construction permit (BPH-821208AA) for a new FM station at Lajas, Puerto Rico. The permittee filed a Form 307 (request for extension of time to construct) on March 22, 1993 (BMPH-930322JO). On April 9, 1993, the David Ortiz Radio Corporation)filed an objection to BMPH-930322JO. The Commission has not yet taken action with respect to either the extension application or the objection to it. In the meantime, the construction permit remains valid.

A copy of this letter was sent to counsel for Ortiz.

37. Rodriguez also reports that its March 22, 1993, extension application remains pending and claims that, under the Administrative Procedure Act, 5 U.S.C. §558(c)(2), a license does not expire until the licensee's application for a new license has been finally determined by the agency. In this case, Rodriguez concludes, no *ex parte* contact within the meaning of the Commission's rules occurred because counsel merely sought a statement from the FM Branch as to the status of the permit and did not seek to influence the merits or outcome of the proceeding and did not discuss whether the permit should be extended or whether Rodriguez should finally be the licensee.

38. The Commission's rules prohibit *ex parte* presentations to or from decision-making personnel in restricted proceedings. 47 CFR §§1.1202(a), 1.1208(a). As defined in the rules, a presentation is any communication directed to the outcome or merits of the proceeding excluding an inquiry or request for information relating solely to status. 47 CFR §1.1202(a); decision-making personnel are employees who are or may reasonably be expected to be involved in the decisional process in the proceeding, 47 CFR §1.1202(c); and adjudications, with certain exceptions, are restricted proceedings. 47 CFR §§1.1204(a)(1), 1.1208(c)(1)(ii); *Report and Order, Ex Parte Communications and Presentations in Commission Proceedings*, 2 FCC Rcd 3011 (1987).

39. We will not add an *ex parte* issue against Rodriguez. Plainly, Freret's letter, addressed to an FM Branch official and pertaining to the validity *vel non* of the construction permit already issued to Rodriguez, was not a communication to an individual with decision-making authority in the proceeding now under consideration by the Board, and did not attempt to speak to either the merits of the issues herein or the outcome of the instant proceeding. Nor is it apparent from the evident thrust of counsel's letter, which was essentially seeking confirmation of the current validity of Rodriguez's construction permit in order to provide assurance to the local Puerto Rican authorities, that any attempt was being made to influence the Commission's consideration of whether Rodriguez's pending construction extension request should ultimately be granted. Indeed, the Bureau's responsive letter gives no indication that it believed counsel's communication was in any way improper or constituted an *ex parte* approach.

40. And Ortiz has not provided any precedential support for its position to the contrary. Its citation to a twenty-year old case, *Jerry Lawrence*, 47 FCC 2d 919 (Rev. Bd. 1974),

involving an *ex parte* submission dealing with the merits of the proceeding before the Board, is inapposite. Moreover, petitioner cites no authority subsequent to the Commission's 1987 *Report and Order, supra,* ¶ 32, wherein modifications reflecting the Commission's first major, across-the-board reexamination of its *ex parte* rules since 1965 were adopted, to support its position. For its part, Rodriguez also relies on an outdated case, *Improvement Leasing Co.,* 73 FCC 2d 655, 668 (1979), for the proposition that Broadcast Bureau (now Mass Media Bureau) staff members are not considered decision-making personnel subject to the *ex parte* rules. *Accord, Redwood Microwave Association, Inc.,* 61 FCC 2d 442, 447 (1976). The *Report and Order,* 2 FCC Rcd at 3014, however, abandoned the exclusive reliance on specific lists of decision-makers contained in the former rules in favor of a broader definition that includes any person "who is or may be expected to be involved" in the decision-making process in the proceeding, thus casting serious doubt on the earlier holdings.

41. In sum, we conclude that no prohibited presentation was intended or occurred. Even if counsel's letter, which contains language expressing a view as to the validity of Rodriguez's construction permit, were deemed a technical violation of the *ex parte* rules, we do not believe disqualification or other sanction would be appropriate under the circumstances presented here. *Cf. William J. Kitchen,* 7 FCC Rcd 4169 (1992). The Commission's recent holding in *Rainbow Broadcasting Co.,* FCC 94-122, released May 23, 1994, supports this view. There, the Commission granted the application of Rainbow for an extension of time within which to construct station WRBW(TV), Orlando, Florida, even though it found that Rainbow, through its counsel, twice violated the *ex parte* rules. The first *ex parte* contact was a telephone call, made at the request of Rainbow's attorney, by the Senior Counsel to the Senate Subcommittee on Communications to the Chief of the Mass Media Bureau. In that call, the Subcommittee Counsel asked whether the staff's previous action cancelling Rainbow's construction permit was consistent with Commission policies encouraging minority ownership of broadcast stations. The second *ex parte* contact was a meeting between Mass Media Bureau staff, Rainbow's attorney, and one of Rainbow's principals at which Rainbow's application was discussed. In both instances, the Commission found that the infractions were mitigated by counsel's sincere belief that the contacts were permissible. In addition, the Commission held that because the violations were isolated, disqualification was inappropriate. *Id.* at ¶ ¶ 22-23, 31-34. Likewise, in the case at bar, it does not appear that counsel for Rodriguez intentionally violated the *ex parte* rules and, even if an infraction did occur, it was an isolated incident. Thus, as the Commission concluded in *Rainbow,* "Consistent with... prior case law, we decline to find that [the applicant's] violation is disqualifying or raises a substantial and material question of fact." *Id.* at ¶ 34. *See also Pepper Schultz,* 4 FCC Rcd 6393, 6403 (Rev. Bd. 1989), and cases cited therein (subsequent history omitted).

42. Finally, in a related matter, Ortiz excepts to the ALJ's denial of its January 19, 1993 Petition to Enlarge, which alleged that Rodriguez had violated Section 319 of the Act, 47 U.S.C. §319, lacked candor with the Commission's staff, and committed an *ex parte* violation. Specifically, Ortiz alleged that Rodriguez, by commencing construction of the station after the court's remand of this case for further proceedings, violated the Commission's policy against premature construction; that Rodriguez lacked candor because it failed to inform the staff at the time of its first extension request of the ongoing hearing proceeding in this case; and that Rodriguez violated the *ex parte* rules because it failed to serve its extension application on the other parties to the proceeding.

43. We agree with the ALJ's ruling, which denied the Petition for the following reasons (*S.I.D.,* n.1):

> Ortiz has not advanced its petition timely. Rodriguez informed Ortiz at least as early as December 15, 1992 when it filed its Proposed Findings that it was issued the construction permit and was in the process of constructing the station. (*See* Rodriguez Proposed Finding, page 2, footnote 4.) Commission's Rule 1.229(b)(3) requires that motion for modifications of issues be filed within 15 days after such facts are discovered by the moving party.
>
> Rodriguez was issued a construction permit on February 12, 1991 and public notice was issued. No reconsideration of the order was sought until Ortiz filed its extant Emergency Petition for Rescission on December 24, 1992. Whether the construction permit was properly issued or not is not a reflection on Rodriguez. It was proper for Rodriguez to act on it albeit to do so was at its own peril, considering the outstanding remanded issues. The Rodriguez application for extension was placed on public notice. This action was not relevant to any issue in the case. Rodriguez had no obligation to inform the staff of the ongoing nature of the proceeding. Besides Ortiz notified the staff of the remand by his "Motion to Strike," filed May 29, 1992. In any event no harm was done to anyone. Rodriguez may not broadcast without an operating permit. There was no intent to conceal anything in this proceeding. The requested character issues and Sections 1.1202 and 1.1208 (*ex parte* communication) issues are not warranted.

44. Moreover, even if the untimeliness of the Petition were not a controlling factor, *see CHM Broadcasting L.P. v. FCC,* D.C. Cir. No. 92-1263, June 14, 1994, Slip. Op. pp. 17-18, the request would fail. We concur that Rodriguez was entitled to proceed to construct albeit at its own risk in the face of the remanded issues. *Cf. Rebecca Radio of Marco,* 5 FCC Rcd 2913 (1990) (and cases cited therein). If anything, the Commission's action extending the construction permit in September 1992, subsequent to the remand, and the Bureau's letter of August 1993 stating that the permit remains valid during the pendency of the second extension request, undermine Ortiz's position that Rodriguez acted improperly. Also, Ortiz has not supported its candor allegations with a specific showing that the necessary element of deceptive intent was present. *See Fox River Broadcasting, Inc.,* 83 FCC 2d at 129. Finally, the *ex parte* infraction, if any, was technical. Under 47 CFR 1.1208, restricted proceedings are adjudicative proceedings which are formally opposed, involve mutually exclusive applications, or are designated for hearing. *See Report and Order,* 2 FCC Rcd at 3021-23. Ortiz cites no authority for the proposition that the mere filing of an extension application by a permittee, even where the original licensing proceeding has been remanded for further hearing, triggers the rule. *See William J. Kitchen,* 7 FCC Rcd at 4170 (formal opposition required to render proceeding involving extension and assignment applications restricted under the *ex parte* rules). *See also Rainbow Broadcasting Co.,* FCC

94-122, at paras. 22-23, 31-34 (unintentional, isolated *ex parte* infractions not disqualifying.) We conclude that no further hearing is warranted.

45. ACCORDINGLY, IT IS ORDERED, That the Petition to Enlarge Issues, filed September 8, 1993, by David Ortiz Radio Corporation, IS DENIED; and

46. IT IS FURTHER ORDERED, That the application of Ramon Rodriguez and Associates, Inc. (File No. BPH-821208AA) IS GRANTED, and the application of David Ortiz Radio Corporation (File No. BPH-830722AL) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 24, 1994

COMMENTS INVITED ON NEW YORK METROPOLITAN AREA PUBLIC SAFETY PLAN AMENDMENT

On May 12, 1989, the Commission accepted the Public Safety Plan for the New York Metropolitan area (Region 8). On May 27, 1994, Region 8 submitted proposed amendments to its plan that would revise the current channel allotments. Because the proposed amendment is a major change to the Region 8 plan, the Commission is soliciting comments from the public before taking action. (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 57.)

Interested parties may file comments to the proposed amendments on or before **August 4, 1994** and reply comments on or before **August 19, 1994.** Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **General Docket 88-476 New York Metropolitan Area-Public Safety Region 8.**

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 24, 1994

COMMENTS INVITED ON ILLINOIS PUBLIC SAFETY PLAN AMENDMENT

On September 30, 1991, the Commission accepted the Public Safety Plan for Illinois (Region 13). On June 6, 1994, Region 13 submitted a proposed amendment to its plan that would revise the current channel allotments. Because the proposed amendment is a major change to the Region 13 plan, the Commission is soliciting comments from the public before taking action. (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 57.)

Interested parties may file comments to the proposed amendment on or before **August 4, 1994** and reply comments on or before **August 19, 1994.** Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **PR Docket 91-228 Illinois-Public Safety Region 13.**

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SAMMONS COMMUNICATIONS, INC

Request for Stay
of Enforcement of Local
Rate Order of City of
Burbank, CA.

ERRATUM

Released: June 29, 1994

By the Chief, Cable Services Bureau:

1. Paragraph 8 of the Order, DA 94-515, released May 23, 1994 is corrected to read as follows:

8. IT IS FURTHER ORDERED that the amount of the refunds required in Burbank's local rate order, and the amount of the difference between rates ordered by the City and the subscriber fees collected during the period of the stay, SHALL BE PLACED by Sammons in an interest-bearing escrow account, and that proof of this shall be filed with the Commission within thirty (30) days of the release of this order. Interest shall accrue at the prevailing U.S. Internal Revenue Service Rate.

FEDERAL COMMUNICATIONS COMMISSION

Meredith Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:

WARNER CABLE
COMMUNICATIONS, INC.

Petition for Stay of Local
Rate Order of City of
Wadsworth, OH

ORDER

Adopted: June 29, 1994; Released: June 29, 1994

By the Chief, Cable Services Bureau:

1. Warner Cable Communications, Inc. ("Warner") filed on April 20, 1994 a Petition for a Stay of Enforcement Pending Review of the local rate order adopted by the City of Wadsworth, Ohio ("City") on March 25, 1994. The local rate order establishes a new schedule of basic service and equipment rates and directs Warner to issue refunds, dating back to September 1, 1993, to subscribers for charges in excess of the newly established rates. The main issue raised by Warner in its petition centers on the regulatory treatment of Warner's a la carte offerings.[1]

2. In a previous *Order*[2] regarding this case, the Commission stayed for 45 days the local rate order adopted by the City pending the resolution of the Letters of Inquiry issued by the Commission with respect to the regulatory treatment of a la carte offerings. While a Letter of Inquiry has not been issued in this case, we granted the previous stay in order to minimize subscriber confusion and ensure regulatory consistency in this important area. The Commission has not yet ruled on the Letters of Inquiry. Therefore, on its own motion, the Commission will extend the stay previously granted in this case for another 45 day period beginning July 1, 1994.

3. During the period of this stay, Warner is ordered to continue, as it volunteered to do in its petition for stay, to deposit in an interest-bearing escrow account the total amount of money that the City has ordered Warner to refund to its customers and to deposit on a going-forward basis in that account the difference between the rates Warner actually charges its customers and the rates that the City has set for Warner's basic service and equipment in its local rate order. Furthermore, Warner is ordered to inform its subscribers, at its own expense, that it is setting up this escrow account and that subscribers who are moving away from Wadsworth should leave a forwarding address with Warner so that they can receive any potential refunds due should the City's rate order be implemented.[3]

4. Accordingly, IT IS ORDERED that the STAY granted by the Commission regarding the local rate order adopted by the City of Wadsworth, Ohio establishing rates for Warner Cable Communication Inc.'s basic service tier and associated equipment is EXTENDED for forty-five (45) more days beginning July 1, 1994. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

5. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[1] A la carte offerings include channels that can be subscribed to individually or as part of a package.

[2] *Order* (Petition for Stay of Local Rate Order of City of Wadsworth, OH), DA 94-511 (released May 17, 1994).

[3] We are not prejudging the method of refund to be used by Warner in the event that Warner does not prevail on the merits. Rather, we take this action to ensure that all options remain open as provided in Section 76.942 of the Commission's rules (47 C.F.R. § 76.942).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:

CENTURY CABLE
OF SOUTHERN CALIFORNIA

Petition for Stay of Local
Rate Order of City of
La Habra, CA

ORDER

Adopted: June 29, 1994; Released: June 29, 1994

By the Chief, Cable Services Bureau:

1. Century Cable of Southern California ("Century") filed on April 28, 1994 an Emergency Petition for a Stay of Enforcement Pending Review of the local rate order adopted by the City of La Habra, California ("City") on March 28, 1994. The local rate order establishes a new schedule of basic service and equipment rates and directs Century to issue refunds, dating back to September 1, 1993, to subscribers for charges in excess of the newly established rates. The main issue raised by Century in its petition centers on the regulatory treatment of Century's a la carte offerings.[1]

2. In a previous *Order*[2] regarding this case, the Commission stayed for 45 days the local rate order adopted by the City pending the resolution of the Letters of Inquiry issued by the Commission with respect to the regulatory treatment of a la carte offerings. While a Letter of Inquiry has not been issued in this case, we granted the previous stay in order to minimize subscriber confusion and ensure regulatory consistency in this important area. The Commission has not yet ruled on the Letters of Inquiry. Therefore, on its own motion, the Commission will extend the stay previously granted in this case for another 45 day period beginning July 1, 1994.

3. During the period of this stay, Century is ordered to continue, as it volunteered to do in its petition for stay, to deposit in an interest-bearing escrow account the total amount of money that the City has ordered Century to refund to its customers and to deposit on a going-forward basis in that account the difference between the rates Century actually charges its customers and the rates that the City has set for Century's basic service and equipment in its local rate order. Furthermore, Century is ordered to inform its subscribers, at its own expense, that it is setting up this escrow account and that subscribers who are moving away from La Habra should leave a forwarding address with Century so that they can receive any potential refunds due should the City's rate order be implemented.[3]

4. Accordingly, IT IS ORDERED that the STAY granted by the Commission regarding the local rate order adopted by the City of La Habra, California establishing rates for Century Cable of Southern California's basic service tier and associated equipment is EXTENDED for forty-five (45) more days beginning July 1, 1994. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

5. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[1] A la carte offerings include channels that can be subscribed to individually or as part of a package.

[2] *Order* (Petition for Stay of Local Rate Order of City of La Habra, CA), DA 94-513 (released May 17, 1994).

[3] We are not prejudging the method of refund to be used by Century in the event that Century does not prevail on the merits. Rather, we take this action to ensure that all options remain open as provided in Section 76.942 of the Commission's rules (47 C.F.R. § 76.942).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:

CENTURY CABLE
OF SOUTHERN CALIFORNIA

Petition for Stay of Local
Rate Order of City of
Brea, CA

ORDER

Adopted: June 29, 1994; Released: June 29, 1994

By the Chief, Cable Services Bureau:

1. Century Cable of Southern California ("Century") filed on April 28, 1994 an Emergency Petition for a Stay of Enforcement Pending Review of the local rate order adopted by the City of Brea, California ("City") on March 24, 1994. The local rate order establishes a new schedule of basic service and equipment rates and directs Century to issue refunds, dating back to September 1, 1993, to subscribers for charges in excess of the newly established rates. The main issue raised by Century in its petition centers on the regulatory treatment of Century's a la carte offerings.[1]

2. In a previous *Order*[2] regarding this case, the Commission stayed for 45 days the local rate order adopted by the City pending the resolution of the Letters of Inquiry issued by the Commission with respect to the regulatory treatment of a la carte offerings. While a Letter of Inquiry has not been issued in this case, we granted the previous stay in order to minimize subscriber confusion and ensure regulatory consistency in this important area. The Commission has not yet ruled on the Letters of Inquiry. Therefore, on its own motion, the Commission will extend the stay previously granted in this case for another 45 day period beginning July 1, 1994.

3. During the period of this stay, Century is ordered to continue, as it volunteered to do in its petition for stay, to deposit in an interest-bearing escrow account the total amount of money that the City has ordered Century to refund to its customers and to deposit on a going-forward basis in that account the difference between the rates Century actually charges its customers and the rates that the City has set for Century's basic service and equipment in its local rate order. Furthermore, Century is ordered to inform its subscribers, at its own expense, that it is setting up this escrow account and that subscribers who are moving away from Brea should leave a forwarding address with Century so that they can receive any potential refunds due should the City's rate order be implemented.[3]

4. Accordingly, IT IS ORDERED that the STAY granted by the Commission regarding the local rate order adopted by the City of Brea, California establishing rates for Century Cable of Southern California's basic service tier and associated equipment is EXTENDED for forty-five (45) more days beginning July 1, 1994. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

5. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[1] A la carte offerings include channels that can be subscribed to individually or as part of a package.

[2] *Order* (Petition for Stay of Local Rate Order of City of Brea, CA), DA 94-512 (released May 17, 1994).

[3] We are not prejudging the method of refund to be used by Century in the event that Century does not prevail on the merits. Rather, we take this action to ensure that all options remain open as provided in Section 76.942 of the Commission's rules (47 C.F.R. § 76.942).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ameritech Operating Companies' Cost Allocation Manual Revisions to Utilize a Statistical Sampling Process for Technician Time Reporting	AAD 94-59

ORDER

Adopted: June 28, 1994; Released: June 28, 1994

By the Chief, Accounting and Audits Division:

1. On April 29, 1994, the Ameritech Operating Companies ("Ameritech")[1] filed revisions to their cost allocation manual ("CAM") to utilize a statistical sampling process for technician time reporting. Ameritech proposes that this process, which it refers to as Enhanced Time Distribution Process ("ETDP"), replace Ameritech's current time reporting process for field technicians as of July 1, 1994. Under the current process, all Ameritech field technicians record their daily work activities on time reporting sheets. Under ETDP, only technicians selected by random sampling would record their daily work activities on such sheets.

2. A Public Notice was issued on May 17, 1994, inviting interested parties to file comments on Ameritech's CAM revisions for ETDP by **June 11, 1994,** and reply comments by **June 25, 1994.** MCI Telecommunications Corporation ("MCI") filed comments, and Ameritech and Southwestern Bell Telephone Company filed replies.

3. Section 64.903(a)(6) of the Commission's rules[2] requires large local exchange carriers, such as the Ameritech companies, to describe their time reporting procedures in their CAMs. Under Section 64.903(b) of the Commission's rules,[3] carriers must file proposed changes to these descriptions at least 60 days prior to their proposed effective date. Although Ameritech has met this deadline, the rules authorize the suspension of proposed changes in time reporting procedures for up to 180 days.[4]

4. We believe that a stay is appropriate here. MCI has highlighted some serious concerns as to Ameritech's ETDP methodology and its potential impact on time reporting results. Because of these concerns, we will stay the effective date of these CAM revisions until December 22, 1994. During this period, we will review Ameritech proposals to determine whether they comply with the Commission's rules and policies.[5]

5. Accordingly, IT IS ORDERED that the revisions to Ameritech's Cost Allocation Manual filed April 29, 1994, IS STAYED until December 22, 1994.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief, Accounting and Audits Division
Common Carrier Bureau

[1] The Ameritech Operating Companies are Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Michigan Bell Telephone Company, The Ohio Bell Telephone Company, and Wisconsin Bell, Inc.

[2] 47 C.F.R. §64.903(a)(6).

[3] 47 C.F.R. §64.903(b).

[4] *Id.*

[5] We anticipate completing this review long before the end of the suspension period.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

PORTLAND CELLULAR PARTNERSHIP — File No. 27414-CL-P-152-B-86

For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B, in Market 152, Portland, Maine

NORTHEAST CELLULAR TELEPHONE COMPANY, L.P. — File No. 27488-CL-P-152-B-86

For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B, in Market 152, Portland, Maine

MEMORANDUM OPINION AND ORDER

Adopted: June 24, 1994; Released: June 29, 1994

By the Commission:

I. INTRODUCTION

1. Before the Commission are two petitions for further reconsideration and a petition for reconsideration of our *Memorandum Opinion and Order* (*MO&O*) in the above-captioned proceeding, 8 FCC Rcd 4146 (1993). Portland Cellular Partnership (Port Cell) and Community Service Telephone Co. (Community) filed separate petitions for further reconsideration on June 25, 1993 and July 6, 1993 respectively. Both Port Cell and Community request reconsideration of the dismissal of Port Cell's application; Community also requests reconsideration of the denial of its request for a waiver of the cellular cross-interest rule.[1] Oppositions to the petitions have been filed by Northeast Cellular Telephone Company, L.P. (Northeast). In addition, Northeast submitted a letter requesting that the Commission further condition the interim operating authority given to Port Cell in the *MO&O*, to which Port Cell submitted an opposition.[2] For the reasons stated below, we deny Port Cell's petition and dismiss in part and deny in part Community's petition. We also deny Northeast's request to condition further the interim operating authority given to Port Cell.

II. DISCUSSION

2. In our *MO&O*, among other things, we denied a petition for reconsideration of our decision in *Portland Cellular Partnership*, 6 FCC Rcd 2283 (1991), on remand from the D.C. Circuit's decision in *Northeast Cellular Telephone Company, L.P. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990), in which we dismissed Port Cell's application for failure to meet our financial qualifications rule and affirmed the staff's prior denial of Community's request for a waiver of the cellular cross-interest rule. In the *MO&O* we also dismissed a Petition for Reconsideration and Reinstatement of License, filed by Port Cell, because the petition was filed nearly a year after the 30-day deadline for such petitions as set forth in Section 405 of the Communications Act. 47 U.S.C. §405. In that petition, Port Cell argued that its license must be reinstated because the Commission's financial qualifications rules had not been approved by the Office of Management and Budget as required by the Paperwork Reduction Act.

3. In its petition for further reconsideration of the *MO&O*, Port Cell argues that the Commission had both the jurisdiction and the discretion to consider its Petition for Reconsideration and Reinstatement of License and that its failure to do so was erroneous. According to Port Cell, Section 405 of the Communications Act of 1934 is not an absolute bar to considering untimely petitions for reconsideration. Port Cell argues that once a timely petition for reconsideration has been filed, the Commission has jurisdiction to reconsider its decision on the grounds raised in the timely petition and also has the discretion to reconsider on grounds raised in other pleadings or by the Commission *sua sponte*, citing *Meredith Corp. v. FCC*, 809 F.2d 863 (D.C. Cir. 1987). Port Cell also cites *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37 (D.C. Cir. 1978), *cert. dismissed*, 441 U.S. 957 (1979), for the proposition that the timely filing of a petition for reconsideration satisfies the jurisdictional requirements of Section 405, tolling the 30-day period for reconsideration of a decision on the Commission's own motion. Other cases cited by Port Cell in support of its petition are *Albertson v. FCC*, 182 F. 2d 397 (D.C. Cir. 1950), *Gardner v. FCC*, 530 F.2d 1086 (D.C. Cir. 1976) and *Enterprise Co. v. FCC*, 231 F. 2d 708 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 920 (1956). In its opposition, Northeast challenges Port Cell's interpretation of these cases.

4. We agree with Northeast that the cases cited by Port Cell do not require acceptance of Port Cell's untimely petition for reconsideration. For example, in *Meredith Corp. v. FCC, supra*, the D.C. Circuit held that it had jurisdiction to consider constitutional arguments raised for the first time by an appellant in a supplement to its timely filed petition for reconsideration to the FCC. Here, Port Cell did not file a timely petition for which it could file a supplement. Likewise, *Central Florida Enterprises v. FCC*,

[1] Section 22.921 prohibits interests of one percent or more in more than one application for a market, and interests of one percent or more in mutually exclusive applications for non-MSA/non-NECMA areas. *See Cellular Radio Lotteries*, 101 FCC 2d 577, 598 (1985).

[2] In addition, Port Cell filed a separate petition for reconsideration of the Commission's decision to grant Northeast's application. That petition will be addressed separately in a future order.

supra, is not on point. There, the Court found that the pendency of a timely petition for reconsideration permitted the Commission, *sua sponte*, to clarify its earlier decision. Furthermore, contrary to Port Cell's assertions, the Commission does not have a statutory duty to consider arguments raised in an untimely petition for reconsideration. As Northeast points out, the fact that the Commission *might have* used the pendency before it of a timely petition for reconsideration filed by a party other than Port Cell as a basis for considering on its own motion the arguments belatedly raised by Port Cell does not mean that it had an *obligation* to do so.

5. Similarly, the *Gardner* case, as interpreted by the court in *Reuters Limited v. FCC*, 781 F. 2d 946 (D.C. Cir. 1986), does not support Port Cell's argument. In *Reuters*, the court held that the Commission was barred by statute from entertaining a belated petition for reconsideration except where, as in *Gardner*, there were extraordinary circumstances under which the mandatory language of Section 405 did not preclude consideration of an untimely petition because the Commission failed to give required notice of its decision. However, the court made it clear that the holding in *Gardner* was limited to the highly unusual circumstances in that case, including the fact that the Commission failed to give notice to the party of its action. Here, there are no extraordinary circumstances which warrant consideration of Port Cell's belated petition. *Albertson* and *Enterprise* are also inapposite. Neither case requires that the Commission consider late-filed petitions for reconsideration. In *Albertson*, the court held that a party may file for reconsideration of a Commission order denying reconsideration if it does so within the statutory time period. In *Enterprise*, the court held that under the circumstances of that case, the Commission should have considered new factual developments presented to it during the pendency of a petition for reconsideration where those new facts went to the heart of the factual premise of the Commission's decision and were raised promptly (within three days) of their discovery. Port Cell's grossly untimely presentation of a new legal argument does not fall within these cases.

6. In sum, while we have discretion to consider, on our own motion, whether Port Cell's application should be reinstated because of alleged Paperwork Reduction Act violations, we believe it would be inappropriate to exercise our discretion in favor of considering Port Cell's argument based on the Paperwork Reduction Act. Port Cell's failure to avail itself of this argument when its compliance with our financial qualifications rule was first called into question imposed a particularly heavy burden on the resources of the court, the Commission and the other parties to this proceeding. These resources were consumed litigating the issue of Port Cell's compliance with the financial qualifications rule and the related waiver issue first before the Commission and then before the court in a difficult appeal, and thereafter again before the Commission on remand and in connection with timely filed petitions for reconsideration. This litigation could have been avoided if Port Cell had been diligent in asserting its rights based on the Paperwork Reduction Act.[3] Moreover, we perceive no countervailing public interest reason at this juncture to reconsider on our own motion our prior decision in the *MO&O*. Accordingly, we deny Port Cell's petition.

7. In its petition for reconsideration, Community asks the Commission to revisit its decision denying Community a waiver of the cellular cross-interest rule. *See* 47 C.F.R. §22.921.[4] This matter has been fully considered before and nothing raised by Community supports revisiting that decision now. Accordingly, we deny Community's petition with respect to this issue.

8. Finally, Northeast has requested that we add conditions to Port Cell's interim operating authority consistent with conditions the staff has issued previously to interim cellular operators where there was no permanent licensee or where the permanent licensee was not ready to commence service. According to Northeast, these conditions would require Port Cell to cooperate fully with it to effectuate a smooth transition to the provision of service in the market by Northeast and to cooperate in transferring the Portland cellular customer base to Northeast. Northeast argues that conditioning Port Cell's interim authority as requested would avoid any disruption in service to the public and would ensure a smooth transition of service from Port Cell to Northeast. In its opposition to this request, Port Cell argues that there is no valid reason for imposing conditions on the continued provision of interim service until a licensee has been selected by a decision that has passed final judicial muster. We believe that additional conditions are unnecessary to ensure a smooth transition. In the *MO&O* we stated that Port Cell's interim operating authority would terminate only when Northeast is ready to begin providing service, and that Northeast shall notify Port Cell of its intention to commence service no less than 10 days prior to commencement of service. Therefore, we deny Northeast's request for imposition of additional conditions. To the extent, however, that Port Cell fails to cooperate in the transition, Northeast can bring evidence of this failure to our attention. We would then be prepared to take whatever action necessary to achieve a smooth transition for cellular customers.

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[3] *Cf. Northwestern Indiana Telephone Co v. FCC*, 872 F.2d 465 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1035 (1990). We note that our decision here differs from other decisions where we have reinstated cellular applications still pending before the Commission on the basis of the fact that the underlying rule had not received approval by the Office of Management and Budget under the Paperwork Reduction Act, even if the applicant had not raised this issue at the earliest possible time. *See Asset Management Corp.*, 6 FCC Rcd 6538 (Mob. Ser. Div. 1991), *Dana Communications, Ltd.*, 7 FCC Rcd 1878 (1992) and *Kent S. Foster*, 7 FCC Rcd 7971 (1992). In none of these cases, however, had the case progressed to a final Commission decision that had been reviewed in court. Indeed, for us to consider the Paperwork Reduction Act issue now might conflict with the court's instruction in *Northeast Cellular* that "[a]bsent a finding" that certain information "was considered and used in formulating an articulable standard at the time the waiver was granted, the FCC *must disqualify* Port Cell's application." *Northeast Cellular*, 897 F.2d at 1167 (emphasis added).

[4] Community also raises, for the first time, financial qualifications and Paperwork Reduction Act issues. Because it has not shown why it did not raise this issue previously, its petition is dismissed with respect to these issues. *See* 47 C.F.R. §1.106(c).

III. CONCLUSION

9. Having reviewed the petitions for further reconsideration filed by Port Cell and Community we affirm our decisions in the *MO&O* regarding the applications of Port Cell and Community. Nor are we convinced that further conditions should be imposed on Port Cell's interim operating authority. This concludes our third decision on remand of *Northeast Cellular Telephone Company, L.P. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990), with respect to Port Cell's and Community's applications.

IV. ORDERING CLAUSES

10. Therefore, for the foregoing reasons, IT IS ORDERED THAT the decisions in *Portland Cellular Partnership*, 8 FCC Rcd 4146 (1993), ARE AFFIRMED to the extent set forth herein.

11. IT IS FURTHER ORDERED THAT the Petition for Further Reconsideration filed by Portland Cellular Partnership IS DENIED.

12. IT IS FURTHER ORDERED THAT the Petition for Further Reconsideration filed by Community Services Telephone Company IS DISMISSED IN PART AND DENIED IN PART.

13. IT IS FURTHER ORDERED THAT the request by Northeast Cellular Telephone Company, L.P. to condition Port Cell's interim operating authority IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 23, 1994

RM-8492

ALCATEL NETWORK SYSTEMS, INC.
PETITION FOR RULEMAKING TO AMEND PART 68
OF THE COMMISSION'S RULES

Pleading Cycle Established

COMMENTS: July 22, 1994
REPLY COMMENTS: August 22, 1994

On June 14, 1994, Alcatel Network Systems, Inc. (Alcatel), a manufacturer of high capacity digital terminal equipment, filed a Petition for Rulemaking requesting the Commission to amend Part 68, Subpart D, of its Rules.

According to Alcatel, while terminals connected to 1.544 Mbps Digital Services are subject to Part 68, Subpart D, these Rules are inconsistent with industry requirements for 1.544 Mbps digital terminals using a DSX interface. Alcatel contends industry standards -- rather than Part 68 rules -- should govern digital terminals using DSX interfaces in a controlled office environment and that Part 68 registration, therefore, should not be required as a condition of their sale or use. Part 68, Subpart D of the Commission's Rules, it says, must be limited to digital terminals using T1 span line, office-to-office interfaces.

Alcatel's Petition may be inspected and copied during the weekday hours of 9 a.m. to 4:30 p.m. in the Commission's Reference Center, Room 239, 1919 M Street, N.W., Washington, D.C. Copies may also be purchased from the Commission's duplicating contractor, International Transcription Services (ITS), 2100 M Street, N.W., Washington, D.C. 20037 (202) 857-3800.

An original and five copies of all comments and reply comments must be filed with the Secretary of the Commission in the manner prescribed in Section 1.49 of our rules in the time set forth above and referenced to Rulemaking (RM) 8492. In addition, one copy of each pleading must be furnished to ITS and one copy to the Chief, Domestic Services Branch, Common Carrier Bureau, Federal Communications Commission, Washington, D.C., 20554.

For further information, contact Marian Gordon at (202) 634-4215.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Authorization of

CONN-2 RSA PARTNERSHIP — File No. 10941-CL-CP-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 358, Connecticut 2 (Windham), for Station KNKN862

In re Application of

CONN-2 RSA PARTNERSHIP (Assignor) and METRO MOBILE CTS of WINDHAM, INC. (Assignee) — File No. 02787-CL-AL-1-92

For assignment of Station KNKN862 in the Domestic Public Cellular Telecommunications Service on Frequency Block A, in Market 358, Connecticut 2 (Windham)

In re Authorization of

TELESYSTEMS COMMUNICATIONS — File No. 10899-CL-CP-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 473, Michigan 2 (Alger), for Station KNKN858

In re Application of

TELESYSTEMS COMMUNICATIONS (Assignor) and MACKINAC CELLULAR CORP. (Assignee) — File No. 09800-CL-AL-1-91

For assignment of Station KNKN858 in the Domestic Public Cellular Telecommunications Service on Frequency Block A, in Market 473, Michigan 2 (Alger)

In re Authorization of

DANBURY CELLULAR TELEPHONE CO. — File No. 10947-CL-CP-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 448, Kentucky 6 (Madison), for Station KNKN940

In re Authorization of

TEMPLETON, INC. — File No. 10957-CL-CP-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 470, Massachusetts 1 (Franklin), for Station KNKN860

In re Application of

TEMPLETON, INC. (Assignor) and FRANKLIN COUNTY CELLULAR, INC. (Assignee) — File No. 07864-CL-AL-1-91

For assignment of Station KNKN860 in the Domestic Public Cellular Telecommunications Service on Frequency Block A, in Market 470, Massachusetts 1 (Franklin)

MEMORANDUM OPINION AND ORDER

Adopted: June 10, 1994; Released: July 8, 1994

By the Commission: Commissioners Ness and Chong not participating.

I. INTRODUCTION

1. Vivian E. Warner[1] filed various pleadings against the above-captioned authorizations and applications. The Division dismissed or denied Warner's pleadings in three

[1] Warner is an unsuccessful cellular radio applicant whose appeal of the Mobile Services Division's (Division) dismissal of her construction authorization applications in all of the above-captioned markets, as well as her Motion to Revoke Wyndcell Corporation's (Wyndcell) construction authorization for market 358A, were denied in *Vivian E. Warner*, 6 FCC Rcd 6033 (1991), *aff'd, Vivian E. Warner v. FCC*, No. 91-1571, (D.C. Cir. Mar. 17, 1993) (*Warner*). Wyndcell was CONN-2's predecessor in interest

letter orders[2] and *Danbury Cellular Telephone Company, Inc.*, 6 FCC Rcd 4186 (1991) (*Danbury I Order*) (collectively, orders). Warner filed Applications for Review of the orders and a Motion to Revoke CONN-2 RSA Partnership's (CONN-2) authorization for cellular Rural Service Area number 358A.[3] For the reasons set forth below, we deny Warner's Applications for Review and Motion to Revoke CONN-2's authorization and we affirm the Division's orders.

2. *Market 358A.* On November 12, 1991, CONN[4] filed an application to assign its cellular nonwireline authorization for RSA number 358A to Metro Windham.[5] On November 15, 1991, Metro Mobile CTS, Inc. (Metro Mobile) filed an application to transfer control of Metro Windham, its wholly-owned subsidiary, to Bell Atlantic Enterprises International, Inc. (Bell Atlantic). Then, Warner filed a Petition to Deny CONN-2's assignment application. In its *CONN-2 Order*, the Division dismissed Warner's Petition to Deny without addressing the petition's substantive merits, and granted CONN-2's assignment application. The Division subsequently granted Metro Mobile's transfer application.[6] Before us now are Warner's Application for Review of the *CONN-2 Order*, her Motion to Revoke CONN-2's authorization for market 358A, which she filed pursuant to Section 312(a) of the Act,[7] and the responsive pleadings.

3. *Market 473A.* Telesystems Communications (Telesystems)[8] filed an application to assign its nonwireline authorization for RSA market 473A to Mackinac Cellular Corp. (Mackinac).[9] Warner filed a Motion to Revoke Telesystems' authorization and a Petition to Deny Telesystems' assignment application.[10] In its *Telesystems Order*, the Division denied Warner's Motion to Revoke and Petition to Deny, and granted Telesystems' assignment application. Before us now is Warner's Application for Review of the *Telesystems Order*.

4. *Market 470A.* Templeton received an authorization for cellular nonwireline RSA market number 470A.[11] Templeton subsequently filed an application to assign its authorization to Franklin County Cellular, Inc. (Franklin). Then, Warner filed a request that the Commission initiate proceedings to revoke Templeton's authorization and a Petition to Deny Templeton's assignment application. In its *Danbury I Order*, the Division denied Warner's revocation request and Petition to Deny, and granted Templeton's assignment application. Before us now are Warner's Application for Review of the Division's denial of her revocation request and Petition to Deny, and the responsive pleadings.

5. *Market 448A.* Danbury Cellular Telephone Company, Inc. (Danbury)[12] received the authorization for cellular nonwireline RSA market number 448A.[13] Warner filed a request that the Commission initiate proceedings to revoke Danbury's construction authorization under Section 312 of the Act (First Motion to Revoke), which the Division denied in its *Danbury I Order*.[14] Warner then filed a Second Motion to Revoke Danbury's authorization, which the Division denied in its *Danbury II Order*. Before us now are Warner's Applications for Review of the Division's *Danbury II Order* and *Danbury I Order*, as it concerns Danbury, as well as the responsive pleadings.[15]

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for market 358A. *See* Public Notice, Report No. CL-91-178 (rel. July 2, 1991) (the Division grants Wyndcell's *pro forma* assignment application to CONN-2 on July 1, 1991).

[2] *See* Letters from the Chief Mobile Services Division to Warner (Ref. No. 63500-JFW) (Jan.24, 1992, Aug. 15, 1991, and Aug. 16, 1991) (*CONN-2 Order, Telesystems Order*, and *Danbury II Order*, respectively).

[3] Because of the similarity of parties and issues, we consider Warner's Applications for Review and Motion to Revoke CONN-2's authorization in this order.

[4] CONN-2 was a general partnership composed of Wyndcell and Metro Mobile CTS of Windham, Inc. (Metro Windham). Wyndcell held an 80.78 percent interest in CONN-2. Metro Windham held a 19.22 percent interest in CONN-2, with an option to acquire Wyndcell's interest. *See* CONN-2 assignment application, Ex. 2 at 1.

[5] *See* CONN-2 assignment application, Ex. 2 at 1 (Metro Windham "proposes to exercise . . . [its] option [to acquire Wyndcell's interest in CONN-2] . . .[,] resulting in the license being held directly by Metro [Windham].").

[6] *See Metro Mobile CTS, Inc*, 7 FCC Rcd 1822 (Mobile Serv. Div. 1992) (rel. Mar. 3, 1992), *application for review pending* (*Metro Mobile*).

[7] Section 312(a) of the Act provides that

> [t]he Commission may revoke any station license or construction permit . . . because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application . . . .

Section 312 of the Act gives the Commission discretion to decide whether to institute revocation proceedings. *See City of Kerrville v. Dugosh Flying Service, Inc.*, 99 FCC 124, 126 (1984); *Puerto Rican Media Action and Educational Council, Inc. v. Educational Broadcasting Corp.*, 51 FCC 2d 1178, 1179 (1975); *Radio Para La Raza*, 40 FCC 2d 1102 n.1 (1973). Requests for revocation are treated as informal requests for Commission action pursuant to Section 1.41 of the Rules.

[8] Telesystems was a general partnership comprised of ten individuals, each of whom held a 10 percent ownership interest in the partnership. *See* Telesystems authorization application, Ex. 1.

[9] Mackinac is owned by the same individuals who were partners in Telesystems. *See* Telesystems assignment application, Ex. 2; *see also id.* "([U]pon FCC approval [of the application, and] . . . . [w]hen stock is issued, [Theodore L. Early (Early) will hold a 53.578 percent interest in Mackinac and each of the remaining nine individuals will hold a 5.158 percent ownership interest in the entity.]").

[10] Warner's Petition to Deny and Motion to Revoke were substantively identical.

[11] *See* Public Notice, Report No. CL-90-295 (rel. Aug. 30, 1990).

[12] Danbury is a wholly-owned subsidiary of ACC Corporation.

[13] *See* Public Notice, Report No. CL-90-306 (rel. Sept. 20, 1990).

[14] In its *Danbury I Order*, the Division also addressed pleadings filed by Warner against Templeton, Inc. *See supra* item IV.

[15] In its oppositions to Warner's Applications for Review, Danbury asserts that Warner lacks standing to file her Motions to Revoke. For the reasons outlined *supra* at note 7, we concur with the Division's finding that the Commission does not recognize motions to revoke. We also concur with the Division's decision to treat Warner's motions as informal requests for Commission action under Section 1.41 of the Rules.

II. DISCUSSION

6. Warner alleges in her various pleadings that the Division improperly dismissed her Petitions to Deny for lack of standing. She requests reinstatement of her Petitions and an order remanding her Petitions to the MSD to be considered on their substantivemerits. For instance, Warner avers in her Application for Review filed against our *CONN-2 Order* that she had standing to file her Petitions to Deny because

> if CONN-2 were not able to construct and operate the Windham system as it certified in its original application and if Warner prevailed at the Court of Appeals [*see supra* note 1] her application would be reinstated and processed. Permitting CONN-2 to assign its authorization prior to constructing the Windham system would injure Warner by denying her right to have her application processed. . . . On the other hand, if Warner's appeal is denied, permitting CONN-2 to transfer its unbuilt authorization would preclude Warner from filing for Windham as an unserved area in the event CONN-2 failed to timely construct the system.[16]

7. Section 309(d)(1) of the Act requires that a petitioner seeking to deny an assignment application establish standing as a "party in interest." Standing is imparted when the petitioner is able to "plead 'injury in fact' fairly traceable to the conduct complained of and likely to be redressed by the requested relief."[17]

8. We do not accept Warner's claim of standing. For instance, Warner's claim of standing for filing her Petition to Deny rests upon a purely speculative course of events resulting in a hypothetical injury, all of which hinges upon the possibility that CONN-2 might not construct in a timely fashion. Warner's hypothetical injury relates indirectly, at best, to a denial of CONN-2's assignment application. We therefore find that Warner has failed to allege an "injury in fact" fairly traceable to the grant of CONN-2's assignment application. Moreover, her grounds for alleging standing are now moot because CONN-2 completed construction of the proposed facilities in a timely fashion,[18] and the United States Court of Appeals for the District of Columbia Circuit (Court) denied Warner's appeal and affirmed the Division's dismissal of her application for market 358A. *See supra* note 1. Further, a denial of CONN-2's assignment application would not necessarily result in the reopening of the application process because it is within the Commission's discretion to grant extensions of the construction period. Therefore, we find that Warner was not injured by the grant of CONN-2's assignment application and did not have standing to file her Petition to Deny under Section 309(d)(1) of the Act. Accordingly, we find that the Division, in its *CONN-2 Order*, properly dismissed Warner's Petition to Deny[19] and, therefore, we dismiss her Application for Review to reinstate and remand her Petition to Deny. Moreover, Warner fails to allege any public interest issues that warrant our consideration.

9. Warner has likewise failed to demonstrate standing in the other markets included in this Order. Her cellular applications in each of the subject markets were properly dismissed upon the grant of a license to a qualified lottery selectee. Moreover, she has utterly failed to allege any injury in fact resulting from the grant of the subject assignment applications. Accordingly, we affirm the dismissal of her petitions. As for Warner's motions to revoke, we find that she has made no allegations which raise public issue concerns worthy of further consideration. Allegations such as that a licensee has had a tax lien filed against him, that a licensee corporation made a routine sale of stock shares during the pendency of the application, and that a licensee failed to construct a system in a different market are not arguments that raise significant public interest concerns which warrant a revocation proceeding. Moreover, as for her Motion to Revoke filed against CONN-2, at the time Warner filed her motion (specifically, April 20, 1992), CONN-2 was not the authorized carrier for the market. Accordingly, her Motion to Revoke this authorization is dismissed. In any event, the Motion to Revoke raises no public interest concerns warranting initiation of a revocation proceeding.

III. CONCLUSION

10. In sum, we find Warner's allegations to be completely meritless. We also find the Division's various orders to be correct and we affirm them.

IV. ORDERING PARAGRAPHS

11. IT IS ORDERED THAT the Applications for Review filed by Vivian E. Warner against CONN-2 RSA Partnership, Metro Mobile CTS of Windham, Inc., Telesystems Communications, and Mackinac Cellular Corp. ARE DISMISSED.

12. IT IS FURTHER ORDERED THAT the Applications for Review filed by Vivian E. Warner against Danbury Cellular Telephone Co., Templeton, Inc., and Franklin County Cellular, Inc. ARE DENIED.

13. IT IS FURTHER ORDERED THAT the Motion to Revoke filed by Vivian E. Warner against CONN-2 RSA Partnership IS DISMISSED.

14. IT IS FURTHER ORDERED THAT *Danbury Cellular Telephone Company, Inc.*, 6 FCC Rcd 4186 (1991), IS AFFIRMED.

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[16] Warner Application for Review at 6, 7. Warner makes virtually identical standing arguments in her petitions in the other captioned markets.

[17] *Orange Park Florida T.V., Inc. v. FCC*, 811 F.2d 664, 670 (D.C. Cir. 1987); *Teleprompter Corporation*, 87 FCC 2d 531, 537 (1981), *aff'd*, 89 FCC 2d 417 (1982) ("In assignment or transfer of license proceedings, 'a party does not have standing [under Section 309] unless it can establish that a grant of the application complained of would result in, or be reasonably likely to result in, some injury of a direct, tangible, or substantial nature." (Citations omitted)); *see also Brian L. O Neill*, 6 FCC Rcd 2572 (1991).

[18] *See* Public Notice, Report No. CL-92-45 at 7 (rel. Feb. 3, 1992) ("CONN-2 filed the initial license to cover the construction permit [FCC Form 489 Notification of Status of Facilities on January 8, 1992.]").

[19] As a result, we find that it is not necessary to determine whether the Division properly determined that Warner's failure to prosecute her Petition to Deny constituted an additional ground for dismissal.

15. IT IS FURTHER ORDERED THAT the *CONN-2 Order* (Letter from the Chief of the Mobile Services Division to Vivian E. Warner (Ref. No. 63500-JFW) (Jan.24, 1992)) IS AFFIRMED.

16. IT IS FURTHER ORDERED THAT the *Telesystems Order* (Letter from the Chief of the Mobile Services Division to Vivian E. Warner (Ref. No. 63500-JFW) (Aug. 15, 1991)) IS AFFIRMED.

17. IT IS FURTHER ORDERED THAT the *Danbury II Order* (Letter from the Chief of the Mobile Services Division to Vivian E. Warner (Ref. No. 63500-JFW) (Aug. 16, 1991)) IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of
Bay Television, Inc.,

Licensee of Television
Station WTTA(TV),
St. Petersburg, Florida,

for a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: May 27, 1994; Released: July 6, 1994

By the Commission: Commissioners Ness and Chong not participating.

1. The Commission has before it for consideration an application for review filed on September 15, 1993, by Bay Television, Inc. Bay Television appeals from the August 16, 1993, action of the Mass Media Bureau issuing a $10,000 forfeiture order[1] to Bay Television as licensee of Television Station WTTA(TV), St. Petersburg, FL.

2. The forfeiture order was issued for repeated violations of 47 C.F.R. § 73.670, which limits the amount of commercial time that may be included in children's television programming. The licensee contends that the forfeiture order is arbitrary and capricious when compared with other cases involving violations of the same rule. The licensee further argues that the forfeiture order contravenes Commission policies encouraging licensees to hire minorities, in that it fails to afford lenient treatment based upon the fact that the station's then newly hired traffic manager responsible for compliance was a member of a minority group.

3. Upon reviewing the licensee's arguments concerning other cases in which the children's commercial limits were exceeded, and upon reviewing the discussion of them in the forfeiture order, we find that a $10,000 forfeiture in this case was neither arbitrary nor capricious. Furthermore, we do not read the forfeiture order as a departure from Commission policies concerning the hiring of minority individuals, as it raises no issue with respect to that subject.

4. WTTA's children's programming broadcast on Thursday, January 16, 1992, exceeded the 12-minutes-per-hour commercial limit by 2.5 minutes in one one-hour block and by 1.5 minutes in a second one-hour block because, according to Bay Television, an inexperienced traffic manager did not realize that, in calculating compliance with the commercial limits, bartered commercial time was to be counted as well as locally inserted commercials.[2]

5. The licensee contends that other licensees claiming to have "misunderstood" the rule early in 1992, when it first went into effect, were treated more leniently than Bay Television. We believe, however, that the forfeiture order logically and reasonably distinguishes the cases cited by the licensee. Moreover, the Mass Media Bureau's action with respect to WTTA is consistent with other Notices of Apparent Liability involving violations of the children's commercialization limits during the first several months they were in effect. *See, e.g., KEVN, Inc.*, 8 FCC Rcd 5077 (MMB 1993) ($15,000 fine for overages caused by management's misunderstanding of the new rules and their applicability to bartered programs); *WKBD, Inc.*, 8 FCC Rcd 5079 (MMB 1993) ($15,000 fine for overages caused by, among other things, station personnel's misunderstanding of the rule); *see also Notice of Apparent Liability to WDKY License Co.* (MMB Aug. 14, 1992) ($7,500 fine for 31 overages, the eight longest being between one and two minutes in length).

6. The licensee attempts to show that KITV, a Hawaii TV station which we merely admonished,[3] was somehow more culpable for its violations than WTTA, which we fined. The licensee argues that KITV's violations were deliberate, while WTTA's violations were inadvertent.[4] The forfeiture order dismisses the notion that KITV's violations were more foreseeable (and therefore more serious) than those of WTTA, which deliberately assigned the responsibility for compliance to a new traffic manager who, as it turned out, did not understand that "air time sold" includes bartered time. We are not persuaded by the licensee's argument that a comparison of the two cases demonstrates that the Bureau was arbitrary and capricious in treating WTTA more harshly. Rather, we believe that the Bureau in its forfeiture order has adequately explained its reasoning with regard to these decisions.

7. Neither are we persuaded by the licensee's attempt to interpret the forfeiture order, particularly the Bureau's discussion distinguishing KITV and WTTA, as undermining Commission policies toward minority employment by licensees. The forfeiture order, without regard to the new traffic manager's minority status, relies on case law stating that a licensee is responsible for the actions of its employees. This is consistent with longstanding Commission

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[1] *See Bay Television, Inc.*, 8 FCC Rcd 5514 (MMB 1993), and *Bay Television, Inc.*, 8 FCC Rcd 412 (MMB 1993) (Notice of Apparent Liability).

[2] Commercial time includes all "air time sold for purposes of selling a product or service." 47 C.F.R. § 73.670, Note 1.

[3] *See Tak Communications, Inc., D.I.P.*, 8 FCC Rcd 488 (MMB Enf. Div. 1993) (recognizing licensee's unique situation requiring delay of network programming for the Honolulu audience, in a time zone five hours earlier than Eastern Standard Time).

[4] KITV had adopted a delayed broadcast schedule starting its children's programming at the half hour rather than at the top of the hour. In doing so, it neglected to consider that this change in the distribution of the commercials might affect compliance with 47 C.F.R. § 73.670. The commercial time limits apply on a "clock-hour" basis. *Children's Television Programming*, 6 FCC Rcd 5093, 5095-96 (1991). If commercial time is evenly distributed in each half hour, such a shift will not necessarily result in commercial overages. Commercial time was not so distributed on the KITV programs in question.

precedent refusing to excuse rule violations caused by the actions of employees.[5] Accordingly, we refuse to overturn the forfeiture order on these grounds.

8. The licensee also attempts to show that its violations were less egregious than the ones for which WFTS-TV received an identical monetary fine.[6] WTTA violated 47 C.F.R. § 73.670 by including too many minutes of commercial time during its children's programming. WFTS-TV violated the rule by including commercials for GI Joe toys during a half-hour GI Joe cartoon program. Such interweaving of commercial and program material renders the entire program a program-length commercial. Although WTTA correctly argues that Commission policies have for many years enjoined such conduct in children's programming, the relative age of the prohibitions is not ordinarily a factor in assessing a forfeiture amount.[7] Furthermore, we do not find it unreasonable that the WTTA forfeiture is the same amount as the WFTS-TV forfeiture. In each decision, the Mass Media Bureau appears to have followed the applicable forfeiture guidelines adopted by the Commission. Moreover, the Mass Media Bureau correctly explained that the cases involve two different kinds of violative conduct and therefore refused to draw a comparison.[8]

9. The licensee reiterates that it deserves lenient treatment because it had been on the air for less than a year when the overages first occurred. We find that the Bureau was correct to reject this argument in mitigation of the rule violations. *See, e.g., J.B. Broadcasting of Augusta, Ltd.*, 41 FCC 2d 507 (1973), and *Stereophonic Alaska, Inc.*, 20 FCC 2d 556 (1969).

10. Having carefully examined the issues before us, it appears that Bay Television, Inc., has presented no valid reason for us to reverse the Bureau's ruling on this matter. Accordingly, the application for review is denied.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[5] *See Triad Broadcasting Co.*, 96 FCC 2d 1235 (1984), and cases cited therein.

[6] *See Tampa Bay Television, Inc.*, 8 FCC Rcd 411 (MMB 1993).

[7] *Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993), *pet. for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992).

[8] *Cf. Melody Music v. FCC*, 345 F.2d 730 (D.C. Cir. 1965), which requires the Commission to treat *similarly* -situated parties in a similar manner.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of
Jacor Broadcasting of Colorado, Inc.
Licensee, Station KOA-AM
Denver, Colorado

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: July 1, 1994; Released: July 12, 1994

By the Chief, Mass Media Bureau:

1. The Commission by the Chief, Mass Media Bureau, acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration (1) a Notice of Apparent Liability (NAL), released June 30, 1993, 8 FCC Rcd 4352 (1993), assessing a forfeiture of $3,125 against Jacor Broadcasting of Colorado, Inc., licensee of Station KOA-AM, Denver, Colorado, for violation of Section 73.1216 of the Commission's Rules ("Licensee-conducted contests"), and (2) a petition for reconsideration filed July 30, 1993, by Jacor Broadcasting.

2. Our NAL details the facts and circumstances underlying our assessment. Jacor Broadcasting does not dispute the accuracy of this account. Briefly stated, the contest at issue was conducted jointly by Station KOA-AM and the Southland Corporation, owner of 7-Eleven stores. When a violation of contest rules at a participating store was reported to Station KOA-AM personnel, these employees contacted the store's manager and took his word that the violation had been corrected, a claim that proved ultimately to be false.

3. Jacor Broadcasting asserts that its reliance on the store manager was both reasonable and sufficient to fulfill its responsibility to investigate. Hence it urges that the forfeiture should be rescinded or substantially reduced. Our concern, however, is not so much with the nature of the licensee's investigation as with its failure to secure compliance with our contest rule. When Station KOA-AM personnel chose to delegate to others a task they could have performed themselves, they thereby assumed responsibility for the others' actions and their consequences. The store manager's failure to comply with contest rules became, in this manner, the failure of Station KOA-AM as well.[1]

4. While we will not rescind or reduce Jacor Broadcasting's forfeiture, we will recalculate its assessment using the criteria of our current *Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993), *pet. for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992). Under these criteria, the base amount for a violation of our contest rule is $5,000, an amount that we will reduce to $2,500 for the reasons set forth in our NAL.[2]

5. Accordingly, the petition for reconsideration filed by Jacor Broadcasting of Colorado, Inc., IS DENIED. IT IS ORDERED, that Jacor Broadcasting of Colorado, Inc., licensee of Station KOA-AM, Denver, Colorado, FORFEIT to the United States the sum of two thousand five hundred dollars ($2,500) for the willful violation of Section 73.1216 of the Commission's Rules. Payment of the forfeiture may be made by mailing to the Commission, at the address indicated in the attachment to this Memorandum Opinion and Order, a check or similar instrument payable to the Federal Communications Commission. In regard to the forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] We do not extend the holdings of *Oak Ridge FM, Inc.*, 8 FCC Rcd 4424 (1993), and *Sequoyah Communications, Inc.*, 8 FCC Rcd 4423 (1993), both cited by Jacor Broadcasting, beyond their own particular facts and circumstances, none of which are applicable here.

[2] Violations of the contest rule were assigned a base forfeiture amount of $6,250 under the original *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *modified in part on recon.*, 7 FCC Rcd 5339 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Release Date: July 12, 1994

US WEST COMMUNICATIONS, INC. AND TELEPHONE UTILITIES OF EASTERN OREGON, INC. FILED A JOINT PETITION FOR WAIVER OF THE DEFINITION OF "STUDY AREA" CONTAINED IN PART 36, APPENDIX-GLOSSARY, AND SECTION 61.41(C) OF THE COMMISSION'S RULES
AAD 94-69

Comment Date: July 27, 1994
Reply Date: August 10, 1994

On June 9, 1994, US West Communications, Inc. ("US West") and Telephone Utilities of Eastern Oregon, Inc., d/b/a PTI Communications. ("Telephone Utilities") filed a joint petition for waiver of the definition of "study area" as set forth in Appendix-Glossary of Part 36 of the Commission's rules. This waiver would allow the parties to reflect the changes in their study area boundaries that would result from US West's sale of twenty-three telephone exchanges in Oregon to Telephone Utilities. Telephone Utilities also seeks waiver of Section 61.41(c) of the Commission's price cap rules, 47 C.F.R. § 61.41, to exempt it from the price cap "All or Nothing" rule and allow it to continue to operate as cost company in the National Exchange Carrier Association's common line and traffic sensitive pools. The parties state that this transaction is pending before the Oregon Public Utility Commission.

Interested parties may file comments on US West and Telephone Utilities' petition on or before **July 27, 1994,** and reply comments on or before **August 10, 1994,** with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. Comments and reply comments should reference AAD 94-69. Four (4) copies should also be sent to Adrian Wright, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554, and one (1) copy should be sent to the Commission's contractor for public service record duplication: International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition may be obtained from the Accounting and Audits Division's public reference room, 2000 L Street, N.W., Room 812, Washington, D.C.; copies are also available from ITS at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally,* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Adrian Wright at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Federation of American Health Systems — File No. ENF-92-008

Petition for Declaratory Ruling, or in the Alternative, Petition for Waiver

MEMORANDUM OPINION AND ORDER

Adopted: July 5, 1994; Released: July 12, 1994

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we address a petition for declaratory ruling filed by the Federation of American Health Systems ("FAHS") on May 20, 1992, regarding the requirement imposed by Section 64.704(c) to permit access to the 10XXX dialing sequence from telephones located in hospital patient rooms. For the reasons discussed below, we dismiss the declaratory ruling request on procedural grounds. We also deny the alternative request by FAHS for waiver of this Section of our rules.

II. BACKGROUND

2. On June 14, 1990, the Commission proposed specific rules to address problems in the operator services industry that had persisted despite previous Commission action.[1] Prior to final action by the Commission on the *NPRM*, Congress passed the Telephone Operator Consumer Services Improvement Act (TOCSIA),[2] which was signed into law in October 1990. The purpose of TOCSIA is "to protect consumers who make interstate operator services calls from pay telephones, hotels, and other public locations against unreasonably high rates and anti-competitive practices."[3]

3. Under TOCSIA, the Commission was required, *inter alia*, to conduct a "general" rule making proceeding to prescribe regulations to implement the provisions of the statute. On December 21, 1990, the Commission released a Further Notice of Proposed Rule Making.[4] The rules proposed in the *FNPRM* superseded those proposed in the *NPRM*. On April 1, 1991, after reviewing comments filed by numerous interested parties, the Commission adopted comprehensive regulations governing the practices and telephone service offerings of operator service providers and the call aggregators with whom they contract to provide operator services.[5] Among other things, the regulations adopted the statutory definition of "aggregator": "any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services."[6]

4. In its petition, FAHS requests that we issue a ruling declaring that hospitals and other health care facilities are not "aggregators" with respect to patient bedside telephones because, according to FAHS, such equipment is not provided in the ordinary course of their operations. Alternatively, FAHS urges the Commission to exercise its discretion to waive the requirements of Section 64.704(c)(5) of its rules for medical facilities with an average monthly volume of less than 2,500 interstate minutes of use for operator-assisted interstate telephone calls from patient telephones.[7]

5. On August 27, 1992, the Common Carrier Bureau issued a Public Notice asking interested parties to comment on the FAHS request.[8]

III. DISCUSSION

6. While FAHS has styled its filing as a petition for declaratory ruling, it is in substance a petition for reconsideration of the Commission's *Report and Order* in CC Docket No. 90-313. The position advocated by FAHS, that hospitals and other health care facilities should not be included within the definition of "aggregator" with respect to telephones located in hospital patient rooms, was presented to the Commission in various comments or reply

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[1] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Notice of Proposed Rule Making, 5 FCC Rcd 4630 (1990) (*NPRM*).

[2] Pub. L. No. 101-435, 104 Stat. 986 (1990) (codified at 47 U.S.C. § 226).

[3] S. Rep. No. 439, 101st Cong., 2nd Sess. 1 (1990).

[4] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Further Notice of Proposed Rule Making, 6 FCC Rcd 120 (1990) (*FNPRM*).

[5] Policies and Rules Concerning Service Providers, CC Docket No. 90-313, Report and Order, 6 FCC Rcd 2744 (1991) (*Report and Order), recon. denied,* 7 FCC Rcd 3882 (1992).

[6] 47 C.F.R. § 64.708(b); *see also* 47 U.S.C. § 226(a)(2).

[7] Petition at 1-2. Section 64.704(c)(5) provides that "[a]ll equipment not included in paragraphs (c)(1), (c)(2), (c)(3), and (c)(4) of this section shall, no later than April 17, 1997, allow the consumer to use equal access ['10XXX'] codes to obtain access to the consumer's desired provider of operator services."

[8] *See* Public Notice: Federation of American Health Care Systems Files Petition for Declaratory Ruling, or in the Alternative, Petition for Waiver, Regarding Classification as "Call Aggregators," 7 FCC Rcd 5981 (Com. Car. Bur. 1992). In response to the Public Notice, supporting comments were filed by the American Hospital Association and the Healthcare Management Information Systems Society; Central State Hospital; Clinch Memorial Hospital; Egleston Children's Hospital; Epic Healthcare Group; Georgia Hospital Association; Redmond Regional Medical Canter; Saint Francis Hospital; Saint Joseph's Hospital, Inc.; Smith Hospital; Walton County Hospital; and U.S. Long Distance Corp. Opposing comments were filed by American Telephone & Telegraph Company ("AT&T"); MCI Telecommunications Corporation; and Southwestern Bell Telephone Company. AT&T also filed Reply Comments.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Release Date: July 12, 1994

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We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally,* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Adrian Wright at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Federation of American Health Systems — File No. ENF-92-008

Petition for Declaratory Ruling, or in the Alternative, Petition for Waiver

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II. BACKGROUND

2. On June 14, 1990, the Commission proposed specific rules to address problems in the operator services industry that had persisted despite previous Commission action.[1] Prior to final action by the Commission on the *NPRM*, Congress passed the Telephone Operator Consumer Services Improvement Act (TOCSIA),[2] which was signed into law in October 1990. The purpose of TOCSIA is "to protect consumers who make interstate operator services calls from pay telephones, hotels, and other public locations against unreasonably high rates and anti-competitive practices."[3]

3. Under TOCSIA, the Commission was required, *inter alia*, to conduct a "general" rule making proceeding to prescribe regulations to implement the provisions of the statute. On December 21, 1990, the Commission released a Further Notice of Proposed Rule Making.[4] The rules proposed in the *FNPRM* superseded those proposed in the *NPRM*. On April 1, 1991, after reviewing comments filed by numerous interested parties, the Commission adopted comprehensive regulations governing the practices and telephone service offerings of operator service providers and the call aggregators with whom they contract to provide operator services.[5] Among other things, the regulations adopted the statutory definition of "aggregator": "any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services."[6]

4. In its petition, FAHS requests that we issue a ruling declaring that hospitals and other health care facilities are not "aggregators" with respect to patient bedside telephones because, according to FAHS, such equipment is not provided in the ordinary course of their operations. Alternatively, FAHS urges the Commission to exercise its discretion to waive the requirements of Section 64.704(c)(5) of its rules for medical facilities with an average monthly volume of less than 2,500 interstate minutes of use for operator-assisted interstate telephone calls from patient telephones.[7]

5. On August 27, 1992, the Common Carrier Bureau issued a Public Notice asking interested parties to comment on the FAHS request.[8]

III. DISCUSSION

6. While FAHS has styled its filing as a petition for declaratory ruling, it is in substance a petition for reconsideration of the Commission's *Report and Order* in CC Docket No. 90-313. The position advocated by FAHS, that hospitals and other health care facilities should not be included within the definition of "aggregator" with respect to telephones located in hospital patient rooms, was presented to the Commission in various comments or reply

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[6] 47 C.F.R. § 64.708(b); *see also* 47 U.S.C. § 226(a)(2).

[7] Petition at 1-2. Section 64.704(c)(5) provides that "[a]ll equipment not included in paragraphs (c)(1), (c)(2), (c)(3), and (c)(4) of this section shall, no later than April 17, 1997, allow the consumer to use equal access ['10XXX'] codes to obtain access to the consumer's desired provider of operator services."

[8] *See* Public Notice: Federation of American Health Care Systems Files Petition for Declaratory Ruling, or in the Alternative, Petition for Waiver, Regarding Classification as "Call Aggregators," 7 FCC Rcd 5981 (Com. Car. Bur. 1992). In response to the Public Notice, supporting comments were filed by the American Hospital Association and the Healthcare Management Information Systems Society; Central State Hospital; Clinch Memorial Hospital; Egleston Children's Hospital; Epic Healthcare Group; Georgia Hospital Association; Redmond Regional Medical Canter; Saint Francis Hospital; Saint Joseph's Hospital, Inc.; Smith Hospital; Walton County Hospital; and U.S. Long Distance Corp. Opposing comments were filed by American Telephone & Telegraph Company ("AT&T"); MCI Telecommunications Corporation; and Southwestern Bell Telephone Company. AT&T also filed Reply Comments.

comments filed in response to the *FNPRM*.[9] In the *Report and Order*, however, the Commission specifically discussed this argument and concluded that hospitals and other health care facilities are within the scope of the definition of "aggregator."[10]

7. Section 405 of the Communications Act provides that "[a] petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of."[11] Section 1.429(d) of the Commission's rules[12] also provides that petitions for reconsideration shall be filed within 30 days from the date of public notice of the action for which reconsideration is sought. Notice of the *Report and Order* was given to the public on April 24, 1991.[13] Thus, pursuant to Section 405, petitions for reconsideration of the *Report and Order* were due no later than May 24, 1991. In the instant case, FAHS filed its petition almost a year after the statutory deadline had expired. Except where the Commission fails to provide notice of its decision to parties as required by our rules, we lack authority to extend or waive the statutory 30-day filing period specified in Section 405.[14] FAHS has not shown (or even argued) that the Commission failed to provide public notice of the *Report and Order*. Therefore, we dismiss its petition as an untimely petition for reconsideration.

8. In any event, the only new argument advanced by FAHS is its contention that the Commission must defer to the definition of patient telephones in hospitals adopted by the U.S. Department of Health and Human Services. FAHS contends that in interpreting the Medicare Act, the Department of Health and Human Services defined patient bedside telephones as personal comfort items, not as services ordinarily furnished by hospitals to patients. FAHS notes that the Medicare Act was enacted prior to TOCSIA.[15] AT&T argues that this contention is "specious" and states that because of the crucial differences in both the statutory language and purpose, there is no basis for FAHS's claim that the Commission must "harmonize" its TOCSIA regulations with the Medicare Act by excluding hospitals from the definition of "aggregator" with respect to patient telephones.[16]

9. We agree with AT&T that there is no logical inconsistency between the two statutory interpretations. Moreover, the legislative history of TOCSIA clearly establishes that Congress considered hospitals to be aggregators, contrary to FAHS's assertion that they are not.[17] In addition, because the Medicare Act was enacted before TOCSIA, we conclude that FAHS could have and should have raised this concern before the Commission in earlier comments or reply comments.

10. In the alternative, FAHS asks that we waive the Section 64.704(c)(5) requirement of selective 10XXX unblocking by April 17, 1997, for medical facilities with less than 2,500 minutes of interstate operator-assisted telephone traffic per month.[18] Absent such a waiver, FAHS claims that these smaller facilities will be burdened with an "unnecessary capital expenditure of millions of dollars to modify or completely replace otherwise satisfactory PBXs long before the end of their useful lives."[19] FAHS argues that medical facilities with lower calling volumes tend to be located in smaller towns or more rural areas, and face more severe constraints on their spending. FAHS further states that the Commission is empowered to look for "special circumstances" when considering an application for exemption from a general rule.[20] FAHS claims that Commission precedent supports grant of its waiver request[21] and that the requested waiver will not interfere with the Commission's ultimate objective of ensuring that consumers have access to their preferred operator services providers. Finally, FAHS argues that the requested waiver "does not apply to 800 and 950 access which provides consumers with access to their preferred operator service providers."[22]

11. Pursuant to Section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, the Commission has authority to waive its rules for good cause shown. The agency may exercise its discretion to waive a rule where particular facts would make compliance inconsistent with the public interest.[23] In our view, FAHS has failed to establish sufficient facts to justify its request for a broad waiver of our rule. FAHS has not offered any probative evidence showing that the 10XXX unblocking requirement would create a burden that is inconsistent with the public interest. In particular,

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[9] *See* comments of the Ohio Hospital Association, Baylor University Medical Center, and Texoma Medical Center, and the reply comments of Lorain Community Hospital. The Commission stated expressly in the *Report and Order* that this issue had been raised:

> Additionally, many parties filed comments requesting that . . . hospitals be excluded from the definition of "aggregator." . . . Hospitals have generally argued that they are not common carriers and, therefore, are not subject to the Commission's jurisdiction.

Report and Order at 2749-50 (footnotes omitted).

[10] *See id.* at 2752.

[11] 47 U.S.C. § 405.

[12] 47 C.F.R. § 1.429(d).

[13] A summary of the *Report and Order* was published in the Federal Register on April 23, 1991. The date of public notice is determined pursuant to Section 1.4 of the Commission's rules, 47 C.F.R. § 1.4. While Section 1.4 has since been modified, under the rule at that time, public notice was deemed to have occurred at 3 p.m. Eastern Time on the day after the date of publication. In this case, public notice was given at 3 p.m. Eastern Time on April 24, 1991. 47 C.F.R. § 1.4(b) (1991). The first day to be counted to determine the thirty-day period in which petitions for reconsideration could be filed was the day after the day of public notice, that is, April 25, 1991.

[14] *See* Association of College and University Telecommunications Administrators, *et al.*, 8 FCC Rcd 1781 (1992); Virgin Islands Telephone Corporation, 7 FCC Rcd 4238 (1992), *remanded on other grounds*, 989 F.2d 1231 (D.C. Cir. 1993); and Richardson Independent School District, 5 FCC Rcd 3135 (1990), *vacated and remanded on other grounds sub nom.* WLOS TV, Inc. v. FCC, 932 F.2d 993 (D.C. Cir. 1991)

[15] Petition at 4-7.

[16] AT&T Comments at 5.

[17] The Senate report accompanying this act states that the term aggregator "includes hotels and motels, *hospitals*, . . . and others." *See* S. Rep. No. 101-439, 101st Cong., 2d. Sess. 10 (emphasis added).

[18] Petition at 11.

[19] *Id.*

[20] *Id.* at 12 (citing WAIT Radio, Inc. v. FCC, 418 F. 2d 1153, 1157 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1970)).

[21] Petition at 13 (citing MTS and WATS Market Structure, CC Docket No. 78-2, Phase III, 100 FCC 2d 860 (1985)).

[22] Petition at 14-15.

[23] *See* Northeast Cellular Telephone Company v. FCC, 897 F.2d 1164 (D.C. Cir. 1990); WAIT Radio, 418 F.2d at 1159.

we note that the Commission adopted a lengthy phase-in period of five years in order to ease the impact of compliance with Section 64.704(c) on aggregators. FAHS has not attempted to demonstrate that this transition is inadequate to address the concerns raised by its waiver request. Moreover, FAHS has failed to present a principled basis for its proposal to use 2,500 minutes of interstate traffic, rather than some other figure, as a benchmark for waiver. Instead, FAHS simply presumes that this amount of traffic justifies a waiver. The petition also fails to show that all medical facilities within such a threshold would be similarly burdened by the 10XXX unblocking requirement. Given the lack of supporting evidence in the record before us, we cannot grant the FAHS request for a waiver of Section 64.704(c)(5).

IV. ORDERING CLAUSE

12. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 405, and the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the petition filed by FAHS on May 20, 1992, IS DISMISSED with respect to its request for a declaratory ruling and IS DENIED with respect to its request for waiver.

FEDERAL COMMUNICATIONS COMMISSION

A. Richard Metzger, Jr.
Acting Chief
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MICHAEL J. VALENTI and
REAL ESTATE MARKET PLACE OF
NEW JERSEY t/a REAL
ESTATE ALTERNATIVE,
Complainants,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY and — File No. E-93-009

MCI TELECOMMUNICATIONS CORPORATION, — File No. E-93-010
Defendants.

MEMORANDUM OPINION AND ORDER

Adopted: July 5, 1994; Released: July 12, 1994

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On November 4, 1992, Michael J. Valenti and Real Estate Market Place of New Jersey t/a Real Estate Alternative (together "REA") filed formal complaints against the American Telephone and Telegraph Company (AT&T) and MCI Telecommunications Corporation (MCI). REA alleged that during October and November 1989, AT&T made numerous unauthorized computerized calls to REA's toll-free business line, which effectively blocked REA's legitimate incoming business calls. REA further claimed that MCI, the provider of REA's 800 service, failed to take any action to remedy the disruptions, despite repeated service requests. AT&T and MCI have requested dismissal of REA's complaints on the ground that they are barred by the statute of limitations contained in Section 415 of the Communications Act of 1934, as amended (the Act).[1] For the reasons discussed below, we dismiss REA's complaints.

II. BACKGROUND

2. In early October 1989, REA began to receive calls over its 800 line, which, once answered, would immediately terminate.[2] These calls apparently continued until November 1989.[3] REA states that it first alerted MCI about the calls shortly after they began and that MCI failed to identify their source or take corrective actions.[4] Subsequently, Mr. Valenti, purportedly through contact with the Federal Bureau of Investigation, learned that the calls originated from various AT&T locations across the country.[5]

3. On November 14, 1989, REA filed claims for damages and injunctive relief against MCI and AT&T in the Ocean County Superior Court of New Jersey. On April 21, 1992, however, the New Jersey court, on MCI's motion and without ruling on the merits of the case, dismissed REA's claim against MCI for lack of subject matter jurisdiction and stayed the claims against AT&T pending acceptance of jurisdiction by the Federal Communications Commission.[6] The court stated that should the Commission reject jurisdiction over AT&T, REA could request that the stay of its claims be lifted.[7]

4. On November 4, 1992, REA filed the instant formal complaints against MCI and AT&T. In the complaints, REA alleged that MCI and AT&T had violated Sections 201(a), 201(b), 202(a) and 203(c) of the Communications Act.[8] REA's claims against AT&T and MCI now before the Commission are almost identical to the claims it advanced in its state court action.

III. DISCUSSION

A. Contentions of the Parties

5. AT&T and MCI have denied REA's allegations and have both requested that we dismiss the complaints for untimeliness.[9] MCI filed its motion to dismiss on January 12, 1993, arguing that REA's formal complaint is untimely under both Section 415(b),[10] the general two-year limitation provision which commences when the cause of action

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[1] 47 U.S.C. § 415.

[2] REA Complaint at 9; REA Brief at 4.

[3] *See* AT&T Brief at 3 ("In October and November 1989, however, AT&T unknowingly placed a limited number of calls to an 800 number used by REA to receive service from MCI.").

[4] REA Brief at 4.

[5] *Id.*

[6] Real Estate Market Place of New Jersey t/a Real Estate Alternative v. MCI and American Tel. & Tel., Order Staying Action and Allowing Submission to Federal Communications Commission, Docket No. OCN-L-5214-89 (Superior Court of New Jersey, Ocean County, April 21, 1992). The court does not explain its apparently different treatment of AT&T and MCI.

[7] *Id.*

[8] 47 U.S.C. §§ 201(a), 201(b), 202(a), 203(c).

[9] Verified Answer of AT&T at 8, para. 50 (filed Jan. 4, 1993); MCI Motion to Dismiss (filed January 12, 1993). Having had a full opportunity to do so, REA declined to address AT&T's statute of limitations defense anywhere in its pleadings. *See* REA Brief, File No. E-93-009 (filed Sept. 30, 1993); REA Reply Brief, File No. E-93-009 (filed Oct. 21, 1993). Because the complaints against AT&T and MCI arose out of the same factual circumstances, in this order we address both defendants' claims that the complaints were untimely filed under Section 415 of the Act.

[10] Section 415(b) of the Act prescribes that complaints against carriers not based on overcharges are to be filed with the Commission not later than two years after the cause of action accrues. 47 U.S.C. § 415(b). "Overcharges" are defined by Section 415(g) as "charges for services in excess of those applicable thereto under the schedules of charges lawfully on file with the Commission." *Id.* § 415(g).

accrues, and Section 415(c),[11] the provision for complaints claiming overcharges. The latter section, unlike Section 415(b), starts the two-year limitation period on the date the carrier disallows or rejects the complainant's claim for overcharges, provided that date is within two years of the date upon which the cause of action accrued. MCI contends that REA's initial state court suit made no claim for overcharges and therefore cannot be judged for timeliness pursuant to the provisions of Section 415(c).[12] MCI alternatively argues that even if the original suit had alleged overcharges, the statute of limitations would have begun to run on December 5, 1989, when MCI filed its answer disallowing complainants' claim and not, as REA states, on July 15, 1991, when MCI filed an amended answer in state court.[13] Furthermore, MCI argues that REA's formal complaint is barred under Section 415(b), the general two-year limitation rule for complaints not seeking overcharges, because both the suit before the state court and the instant formal complaint specify that the alleged wrongdoing occurred during the period of October through November 1989.[14] Relying on REA's own timetable, MCI argues that the cause of action against MCI could have accrued no later than November 1989, causing the statute of limitations under Section 415(b) to lapse no later than November 1991.[15]

6. In its opposition, REA insists that its formal complaint against MCI is timely under both Sections 415(b) and 415(c). REA argues that the New Jersey suit contained a claim for overcharges which, under Section 415(c), started the relevant time period on July 15, 1991, the date MCI filed its amended answer in which it disallowed REA's claim.[16] REA further argues that the formal complaint was timely filed even if the Commission were to apply the general two-year limitation provision under Section 415(b) because its cause of action accrued in May 1991, when REA's MCI 800 service was terminated.[17] REA calculates, therefore, that under Section 415(b), the two-year limitation period would lapse no earlier than May of 1993, while under Section 415(c), the limitation period would lapse on July 15, 1993.[18]

7. REA contends that should Section 415 bar its formal complaint, equity would compel the Commission to stop MCI from raising a timeliness challenge because MCI delayed the filing of the complaint by purposefully prolonging the New Jersey court proceeding.[19] To support its equitable tolling argument, REA cites *Bunker Ramo Corp. v. Western Union Telegraph*, in which the Commission's Review Board affirmed that a defendant should not be allowed to raise untimeliness as a defense where the defendant's own actions were the primary cause of the tardiness.[20] REA argues that MCI delayed the state court proceedings for over two years, only to move then for dismissal on subject matter jurisdiction grounds, and is now attempting again to avoid the merits of the case by moving for dismissal on the basis of a delay for which MCI alone is responsible.[21]

8. In its Reply, MCI argues that its actions in the state court proceeding complied with the court's rules in all respects.[22] MCI contends that it caused no delays and, in fact, first challenged the court's jurisdiction in its answer to REA's New Jersey complaint, which it filed on December 5, 1989, well before the Commission's statute of limitations had lapsed.[23] Finally, MCI argues that it was REA's responsibility to file its action in the correct forum and that REA's failure to do so does not toll the statute of limitations.[24]

B. Decision

9. After having carefully considered the arguments of the parties, we grant AT&T's and MCI's motions to dismiss. As noted above, REA did not reply to AT&T's claim that the complaint against it was untimely. Further, we are not persuaded by REA's arguments that its formal complaint against MCI is timely or that the equitable tolling doctrine should stop that defendant from using timeliness as a defense. We conclude that REA's complaints before the Commission are untimely under both Section 415(b) and Section 415(c) of the Act. Moreover, we find that REA's alternative reliance on the equitable tolling doctrine is misplaced.

10. Assuming *arguendo* that REA's New Jersey suit contained claims against MCI for the recovery of overcharges, Section 415(c) would clearly require the statute of limitations to begin to run on December 5, 1989, the date MCI filed its original answer disallowing REA's claim. This written disallowance would cause the statute to expire on December 5, 1991, and not on July 15, 1993, as REA contends.

11. REA's application of Section 415(b), the general two-year statute of limitations, is similarly defective. Under Section 415(b), which prescribes that the two-year period begins when the complainant's cause of action accrues, REA's cause of action accrued no later than November 1989, when the last AT&T calls were placed. REA's own pleadings indicate that it became aware of the defendants'

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[11] Section 415(c) of the Act requires that complaints for the recovery of overcharges be filed within two years from the time the cause of action accrues. *Id.* § 415(c). Under this provision however, the limitation period can be tolled for an additional two years from the time the carrier disallows a written claim for overcharges if the complainant had transmitted that claim to the carrier within two years from the time the cause of action accrues. *Id.*

[12] MCI Reply at 2-3 (filed Feb. 16, 1993). MCI contends that REA's initial complaint, in which it disputes the $5,594.50 in charges for AT&T generated calls, "is not a request for recovery of overcharges because this amount represents the tariffed rate . . . and, therefore, Section 415(c) does not apply." *Id.* at n.1.

[13] *Id.* at 3.

[14] *Id.*

[15] *Id.*

[16] REA Opposition at 6-7 (filed Feb. 3, 1993).

[17] *Id.* at 7.

[18] *Id.*

[19] *Id.*

[20] 31 FCC 2d 449, 453 (1971) (citing Thornell Barnes Co. v. Illinois Bell Telephone Co., 1 FCC 2d 1247, 1252 (1965): "The basic purpose of [statutes of limitations] is to prevent fraudulent and/or false stale claims from arising after more than a reasonable length of time. However, a defendant should not be permitted to interpose a statutory time as a defense where his conduct is the primary reason for the tardiness of the plaintiff's action.").

[21] REA Opposition at 7.

[22] MCI Reply at 4.

[23] *Id.*

[24] *Id.*

alleged wrongdoing in either October or November 1989.[25] Therefore, we conclude that REA cannot validly argue that the statute of limitations lapsed later than November 1991.

12. Finally, REA's alternative equity argument does not persuade us to stop MCI from raising timeliness as a defense. As delineated by the Commission in *Bunker Ramo*, the equitable tolling doctrine holds that a defendant should not be permitted to raise untimeliness as a defense where it was primarily responsible for the tardiness in filing.[26] In the instant proceeding, the primary responsibility for the complaint's tardiness rests upon REA, not MCI. It was REA's failure to file its action with the Commission, and not MCI's conduct in the state court proceedings,[27] that constituted the primary cause of the complaint's untimeliness. The equitable tolling doctrine is, therefore, inapplicable to the instant proceeding.

13. MCI has asserted a claim for $5,766.51 in unpaid charges for telecommunications services it provided to REA, plus costs and attorneys' fees.[28] Because Title II of the Communications Act was designed primarily to protect customers in their dealings with communications common carriers, the Commission is only authorized to adjudicate complaints against common carriers, not against customers.[29] Hence, a collection claim by a carrier such as MCI against a customer such as REA does not state a proper cause of action under the Act.[30] Accordingly, we dismiss the MCI counterclaim against REA.

IV. CONCLUSION

14. For the reasons stated above, we grant the defendants' requests to dismiss REA's complaints for untimeliness under Section 415 of the Communications Act. We therefore dismiss the REA complaints on that ground and the MCI counterclaim for failure to state a cause of action.

V. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201, 207, 208, and 415 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 207, 208, 415, that the requests for dismissal filed by MCI and AT&T ARE GRANTED and that the above-captioned formal complaints ARE DISMISSED.

16. IT IS FURTHER ORDERED that the counterclaim filed by MCI Telecommunications Corporation on January 4, 1993, IS DISMISSED.

17. IT IS FURTHER ORDERED that the Motion to Defer filed by MCI Telecommunications Corporation on March 24, 1993, IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

A. Richard Metzger, Jr.
Acting Chief
Common Carrier Bureau

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[25] REA Complaint at paras. 22-23. The Commission addressed the issue of accrual under Section 415 in Armstrong Utilities, Inc. v. General Tel. Co. of Pennsylvania, where it stated that while the Communications Act itself does not specify the point of accrual of the cause of action,

> the cause of action which commences the limitation period "accrues when the carrier does the unlawful act or fails to do what the law requires, on account of which damages are claimed."

25 FCC 2d 385, 390 (1970) (cause of action, if any, arose when telephone carrier refused to enter into agreement for lease of space on its own poles) (quoting Accrual of Cause of Action, 15 I.C.C. 201, 204 (1909) (a ruling of the Interstate Commerce Commission on former Section 16(3)(b) of the Interstate Commerce Act, upon which Section 415 of the Communications Act is based)); *cf.* Chevron U.S.A. v. United States, 923 F.2d 830, 834 (Fed. Cir. 1991) (under different statute, limitation period "commences to run when claimants know or should know of their potential claims"); Kropinski v. World Plan Executive Council, 853 F.2d 948, 956 (D.C. Cir. 1988) (statute of limitations begins to run when prospective plaintiff knows or should know through exercise of due diligence of right to recover).

[26] 31 FCC 2d at 454.

[27] Indeed, it appears that MCI first challenged the state court's jurisdiction in its December 5, 1989 answer to REA's state court complaint.

[28] MCI Answer and Verified Counterclaim at 15-17.

[29] Illinois Bell Tel. Co. v. American Tel. & Tel. Co., 4 FCC Rcd 5268, 5270 (1989).

[30] *See id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-76

In the Matter of

Amendment of Section 73.202(b), RM-8477
Table of Allotments,
FM Broadcast Stations.
(Chester, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 28, 1994; Released: July 13, 1994

Comment Date: September 3, 1994
Reply Comment Date: September 20, 1994

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by m. JAYNE sawyer ("petitioner") requesting the allotment of Channel 296A to Chester, California, as that community's second local FM service. Petitioner stated her intention to apply for Channel 296A if it is allotted to Chester, as requested.

Technical Statement

2. A staff review of the proposal reveals that Channel 296A can be allotted to Chester, California, consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, provided the transmitter is located at least 5.0 kilometers (3.1 miles) northwest of the community at coordinates North Latitude 40-20-34 and West Longitude 121-16-15, to avoid short-spacing to the licensed site of Station KRNO-FM, Channel 295C, Reno, Nevada, at coordinates North Latitude 39-18-38 and West Longitude 119-53-01.

3. We believe the public interest would be served by proposing the allotment of Channel 296A to Chester, California, since an interest has been expressed in providing a second local FM service to that community. Therefore, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Chester, California, as follows:

	Channel No.	
City	Present	Proposed
Chester, California	255C	255C, 296A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **September 3, 1994,** and reply comments on or before **September 20, 1994,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

M. Jayne Sawyer
P.O. Box 1074
Chico, California 95927

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-78

In the Matter of

Amendment of Section 73.202(b), RM-8472
Table of Allotments,
FM Broadcast Stations.
(Cloverdale, Alabama)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 29, 1994; Released: July 13, 1994

Comment Date: September 3, 1994
Reply Comment Date: September 20, 1994

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Pulaski Broadcasting, Inc. ("petitioner"), seeking the allotment of FM Channel 254A to Cloverdale, Alabama, as that locality's first local aural transmission service. Petitioner states its intention to apply for Channel 254A if it is allotted to Cloverdale, as requested.

2. In support of the proposal, petitioner states that Cloverdale is an incorporated town that is attributed with a population of 610 persons in the 1990 U.S. Census. Additionally, petitioner advises that Cloverdale has its own local government, police protection and a volunteer fire department.

3. Section 307(b) of the Communications Act of 1934, as amended, requires the Commission to allot channels "... among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to demonstrate its status. Contrary to petitioner's assertion, we are unable to confirm that Cloverdale is listed as an incorporated community in the U.S. Census.[1] Rather, we note that Cloverdale is listed in the Census as a Division of Lauderdale County.[2] In view of the noted discrepancy, petitioner should provide evidence to demonstrate that Cloverdale is incorporated, or that it contains other indicia of a community such as a newspaper, social, economic or cultural organizations, municipal services, or governmental units that identify themselves specifically with Cloverdale. *See, e.g., Gretna, et al., Florida,* 6 FCC Rcd 633 (1991); *Oak Grove, Florida,* 5 FCC Rcd 3774 (1990); *Statenville, Georgia,* 5 FCC Rcd 2685 (1990); and *East Hemet, et al., California,* 4 FCC Rcd 7895 (1989).

4. We believe the petitioner's proposal to provide a first local aural transmission service to Cloverdale, should it ultimately be deemed a community for allotment purposes, merits further consideration. Therefore, as indicated *infra,* we invite comments on the proposal.

Technical Statement

5. A staff analysis has determined that Channel 254A can be allotted to Cloverdale in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules without a site restriction at coordinates North Latitude 34-56-19 and West Longitude 87-46-17.[3]

6. In view of the above, we solicit comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, to include Cloverdale, Alabama, as follows:

	Channel No.	
City	Present	Proposed
Cloverdale, Alabama	--	254A

[1] We do note that Cloverdale is listed in the 1994 Rand McNally Commercial Atlas and Marketing Guide ("Atlas") which attributes that locality with a population of 610 persons. However, mere geographic location is not sufficient to establish "community" status. *See, Vimville, Mississippi,* 48 FR 5974 (1983), *Hannibal, Ohio,* 6 FCC Rcd 2144 (1991), *Trade, Tennessee and Beach Mountain, North Carolina,* 6 FCC Rcd 5835 (1991). Additionally, although the Atlas reflects the existence of a zip code and post office for Cloverdale, neither of those components are sufficient to establish "community" status. *See, Graham, Washington,* 7 FCC Rcd 1676 (1992); *Jackpot, Nevada,* 6 FCC Rcd 4207 (1991); and *Coker, Alabama,* 43 RR 2d 190 (1978). No indication of Cloverdale's incorporation or its existence as a census designated place "CDP" is given in the Atlas.

[2] Based upon U.S. Census data, a census county division ("CCD") is a geographical area that has been delineated for the purpose of gathering data for inclusion in the Census. Further, the Census Bureau defines a CCD as having no legal function nor is it a governmental unit. Moreover the boundaries of a CCD are usually delineated to follow visible features and in most cases coincide with census tract or block numbering area boundaries. Additionally, CCD's are named based on a place, county, or familiar local name that identifies its location. *Cf. Hollywood and California, Maryland and King George, Virginia,* 3 FCC Rcd 4043 (1988) (area comprised of collective Census Enumeration Districts "CED's" does not constitute a single community for allotment purposes).

[3] The designated site for Channel 254A at Cloverdale does not eliminate a short spacing to the licensed site for Station WZLQ(FM), Channel 253C1, Tupelo, Mississippi, at coordinates North Latitude 34-18-09 and West Longitude 88-42-21. However, the proposal does meet the minimum distance separation requirements to the site specified in the construction permit issued to Station WZLQ(FM) at coordinates North Latitude 34-10-05 and West Longitude 89-09-23. Therefore, in the event the petitioner's proposal herein is ultimately adopted, the issuance of a license for Channel 254A at Cloverdale, Alabama, may be withheld until Station WZLQ(FM) is licensed on Channel 253C1 at the site specified in its construction permit. We will serve a copy of this *Notice* on the licensee of Station WZLQ(FM).

7. IT IS ORDERED, That the Secretary shall send a copy of this *Notice* to the licensee of Station WZLQ(FM) as follows: San Dow Broadcasting, P.O. Box 2639, Gulfport, Mississippi 39503.

8. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

9. Interested parties may file comments on or before **September 3, 1994,** and reply comments on or before **September 20, 1994,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner and its consultant, as follows:

Hershel Lake
President, Pulaski
Broadcasting, Inc.
P.O. Box 738
Pulaski, TN 38478

Kirk A. Tollett
Commsouth Media
Associates
4001 Highway 78 East
Jasper, AL 35501
(Consultant to Petitioner)

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections* 73.202(b), *and* 73.606(b) *of the Commission's Rules,* 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

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(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

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of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-80

In the Matter of

Amendment of Section 73.606(b), RM-8445
Table of Allotments,
TV Broadcast Stations.
(Iron Mountain and Menominee,
Michigan, Wittenberg, Wisconsin
and Ely, Minnesota)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 30, 1994; Released: July 13, 1994

Comment Date: September 6, 1994
Reply Comment Date: September 21, 1994

By the Acting Chief, Allocations Branch:

1. The Commission considers herein a petition for rulemaking filed by Douglas A. Maszka d/b/a Tri-Cities Television Company ("petitioner"), seeking the substitution of Channel *25 for vacant Channel *17 at Iron Mountain, Michigan, allotment of Channel 31 to Menominee, Michigan, and allotment of Channel 17 to Wittenberg, Wisconsin. Petitioner submitted an engineering analysis in support of the proposal and states its intention to file an application for Channel 31 at Menominee and Channel 17 at Wittenberg.

2. Menominee (population 9,398)[1] seat of Menominee County (population 24,920) is located on Michigan's Upper Peninsula, approximately 70 kilometers (45 miles) northeast of Green Bay, Wisconsin. Wittenberg (population 1,145) in Shawano County (population 37,157) is located in northeastern Wisconsin approximately 37 kilometers (23 miles) southeast of Wausau, Wisconsin. Iron Mountain (population 8,525) seat of Dickinson County (population 26,831) is located on the Upper Peninsula approximately 150 kilometers (93 miles) north of Green Bay.

3. A staff engineering analysis of the proposal indicates that Channel 31 can be allotted to Menominee, Michigan, and Channel 17 can be allotted to Wittenberg, Wisconsin. Both allotments require the substitution of Channel *25 for vacant Channel *17 at Iron Mountain, Michigan. However, it is Commission policy not to make substitutions when other channels are available for allotment without changing channels. Our analysis indicates that Channel 25+ can be allotted to Menominee, Michigan, at a site 17.8 kilometers (11 miles) north of the community and Channel 46 can be allotted to Wittenberg, Wisconsin, at a site 30.7 kilometers (19.1 miles) north of the community.[2] In the alternative, we will also propose, as requested by petitioner, the allotment of Channel 17- at Wittenberg, Wisconsin, the substitution of Channel *25+ for vacant Channel *17+ at Iron Mountain, Michigan, and the allotment of Channel 31+ at Menominee, Michigan.[3] Petitioner is requested, however, to provide specific information explaining why its original proposal requiring the substitution at Iron Mountain, Michigan, is superior as well as any other information regarding the public interest benefits or possible site problems. Canadian concurrence will be requested since the communities are located within 400 kilometers (250 miles) of the U.S.-Canadian border. The proposed allotments of Channel 25 in Menominee, Channel *25 in Iron Mountain and Channel 31 in Menominee will require a plus offset. The proposed allotment of Channel 17 in Wittenberg will require a minus offset.[4] Further, the offset of Channel *17 in Ely, Minnesota, must be changed from a minus to a plus to accommodate the allotment of Channel 17- at Wittenberg.[5] Although the Commission has imposed a temporary freeze on new television allotments in certain metropolitan areas, the proposed80 allotments at Menominee, Wittenberg and Iron Mountain are not affected thereby.[6] The suggested sites place the allotments beyond the required distance of 248.6 kilometers (155 miles) from Milwaukee, Wisconsin, the closest freeze market.

4. We believe the public interest would be served by proposing television allotments to Menominee or Wittenberg, as a first local television service would be provided to either community. Section 73.3555 of the Commission's Rules precludes ownership by the same licensee of two television stations if the Grade B contours of the two stations overlap. If the station at Menominee and Wittenberg were to operate at maximum facilities, a distance of 219 kilometers (136 miles) would be required between the two stations. However, the actual distance between the two restricted sites is only 120 kilometers (75 miles). Therefore, if petitioner is the successful applicant for both channels, one or both stations would be required to operate at limited facilities. Since petitioner is not eligible to file an application for each channel to operate at maximum facilities in both communities, we will seek comments on the proposed amendment of the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, for the communities listed below, to read as follows:

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[1] The population figures are taken from the 1990 U.S. Census.

[2] The coordinates for Channel 25+ at Menominee are 45-16-00 and 87-36-48. The coordinates for Channel 46 at Wittenberg are 45-05-53 and 89-07-31.

[3] The coordinates for Channel 31+ at Menominee, Michigan, are 45-16-00 and 87-36-48, the coordinates for Channel 17- at Wittenberg, Wisconsin, are 45-05-00 and 89-10-06 and the coordinates for Channel *25+ at Iron Mountain, Michigan, are 45-49-12 and 88-04-31.M

[4] "A station with a plus or minus offset is required to operate with its carrier frequency 10 kHz above or below the normal carrier frequency. A different offset between two television stations reduces interference and makes possible the separation criteria set forth in our Rules." *Crandon, Wisconsin*, 3 FCC Rcd 6765 n.1 (1988).

[5] The coordinates for Channel *17+ at Ely, Minnesota, are 47-54-06 and 91-51-48.

[6] The Commission has imposed a freeze on new television allotments in certain metropolitan areas. *See Notice of Inquiry*, 2 FCC Rcd 2125 (1987) and *Order*, 52 FR 28346, July 29, 1987.

Community	Channel No. Present	Proposed
OPTION I		
Menominee, Michigan	---	25+
OPTION II		
Wittenberg, Wisconsin	---	46
OPTION III		
Iron Mountain, Michigan	8-, *17+	8-, *25+
Menominee, Michigan	---	31+
OPTION IV		
Iron Mountain, Michigan	8-, *17+	8-, *25+
Wittenberg, Wisconsin	---	17-
Ely, Minnesota	*17-	*17+

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **September 6, 1994**, and reply comments on or before **September 21, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

Douglas A. Maszka d/b/a
Tri-Cities Television Company
600 Vroman Street
Green Bay, Wisconsin 54303

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

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(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

Robert H. McNamara
Chief, Special Services Division

In the Matter of

Petition to Amend Section 97.201(b) of the Amateur Service Rules — RM-8399

ORDER

Adopted: June 16, 1994; Released: July 14, 1994

By the Chief, Special Services Division

1. On October 20, 1993, John S. Burningham filed a petition for rule making (RM-8399) to amend Section 97.201(b) of the Commission's Rules, 47 C.F.R. § 97.201(b),[1] so as to authorize auxiliary stations to transmit on the 50-54 MHz amateur service band.[2] He states that this change will allow such stations to participate in digital packet radio message forwarding systems[3] and make it possible for them to reliably communicate over longer distances than is possible on the shorter wavelength bands.[4]

2. The rules applicable to amateur service message forwarding systems, however, were revised effective June 1, 1994, in PR Docket No. 93-85.[5] In that proceeding, the Commission amended the definition of an auxiliary station[6] to specifically exempt stations participating in message forwarding systems from the frequency restrictions otherwise imposed on auxiliary stations. The frequency restriction applicable to stations transmitting under automatic control when participating in digital message forwarding systems is in Section 97.109(d) of the Commission's Rules, 47 C.F.R. § 97.109(d). This section already permits such stations to use the 50-54 MHz amateur service band.

3. Because the rules do not prohibit amateur stations from being used in the manner proposed by the petitioner, we find the petitioner's proposal is unnecessary. Accordingly, pursuant to Section 1.401(e) of the Commission's Rules, 47 C.F.R. § 1.401(e), IT IS ORDERED that the Petition for Rule Making, RM-8399, filed by John S. Burningham IS DISMISSED.

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[1] *Public Notice*, Report No. 1989, December 6, 1993.

[2] Because the amateur service frequency bands often differ between the three International Telecommunication Union (ITU) regions, the amateur community worldwide refers to radio spectrum in terms of approximate wavelength as measured in meters (m). Part 97 of the Commission's Rules, 47 C.F.R. §§ 97.1-97.527, also uses this terminology to designate frequency bands. The frequency band 50-54 MHz, therefore, is designated as the 6 m band.

[3] Section 97.3(a)(28) of the Commission's Rules, 47 C.F.R. § 97.3(a)(28), defines a message forwarding system as a group of amateur stations participating in a voluntary, cooperative, interactive arrangement where communications are sent from the control operator of an originating station to the control operator of one or more destination stations by one or more forwarding stations.

[4] Petition at 1. Section 97.201(b) of the Commission's Rules, 47 C.F.R. § 97.201(b), restricts generally an auxiliary station to transmitting only on the 1.25 m (222-225 MHz) and shorter wavelength bands.

[5] *See Report and Order*, PR Docket No. 93-85, 9 FCC Rcd 1786 (1994). These revisions, however, did not authorize automatic control of stations transmitting on the HF bands. *See also*, *Public Notice*, Report No. DC-2605, June 2, 1994.

[6] An auxiliary station is defined as an amateur station, other than in a message forwarding system, that is transmitting communications point-to-point within a system of cooperating amateur stations. *See* Section 97.3(a)(7) of the Commission's Rules, 47 C.F.R. § 97.3(a)(7). At the time the petition was filed, this definition did not contain the exemption for a station in a message forwarding system. *See* former Section 97.3(a)(7) of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-77

In the Matter of

Amendment of Section 73.202(b), RM-8470
Table of Allotments,
FM Broadcast Stations.
(Shasta Lake City, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 28, 1994; Released: July 14, 1994

Comment Date: September 7, 1994
Reply Comment Date: September 22, 1994

By the Acting Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed by Mark C. Allen ("petitioner") requesting the allotment of FM Channel 276A to Shasta Lake City, California, as that community's first local aural transmission service. Petitioner stated his intention to apply for Channel 276A if it is allotted to Shasta Lake City, as requested.[1]

2. As Shasta Lake City is not listed in the 1990 U.S. Census, petitioner provided documentation to evidence that in July 1993, the communities of Central Valley, Summit City, Project City, and Pine Grove were dissolved and incorporated into the newly created community of Shasta Lake City. To support its claim, petitioner provided documentation consisting of a certified statement from Richard W. Curry, Executive Officer of the Shasta County Local Agency Formation Commission, verifying Shasta Lake City's incorporation, and included a copy of Resolution No. 93-02 of the Shasta County Local Agency Formation Commission regarding the terms and conditions related thereto. The Resolution also included a map of Shasta Lake City delineating the official boundaries of the newly created community.

3. We believe the public interest would be served by proposing the allotment of Channel 276A to Shasta Lake City since it could provide a first local aural transmission service to the community.[2]

Technical Statement

4. Channel 276A can be allotted to Shasta Lake City, California, in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, provided the transmitter is located at least 5.5 kilometers (3.4 miles) north of the community at coordinates North Latitude 40-43-58 and West Longitude 122-21-59.

5. Accordingly, we seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

	Channel No.	
City	Present	Proposed
Shasta Lake City, California	–	257C3,[3] 276A

6. IT IS ORDERED, That the Secretary of the Commission shall send a copy of this *Order* by Certified Mail, Return Receipt Requested, to the permittee of Station KNNN(FM), as follows: Quality Broadcasters of California, L.P., 1326 Market Street, Redding, CA 96001.

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by referenceherein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **September 7, 1994**, and reply comments on or before **September 22, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

Mark C. Allen
3745 McHale Way
Redding, CA 96001

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[1] Although the petitioner's request was signed, he failed to include an affidavit verifying that the statements contained in the petition are accurate to the best of his knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.401(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, 3919 n.41 (1990). The petitioner is requested to rectify this omission in his comments.

[2] A construction permit has been issued to Quality Broadcasters of California, L.P. ("QBC") for Station KNNN(FM), Channel 257C3, Central Valley, California (File No. BPH-920520ID). In view of Central Valley's dissolution and incorporation into Shasta Lake City, the former community no longer exists as a separate entity. Therefore, Section 73.202(b) of the Commission's Rules, the FM Table of Allotments, must be editorially amended to reflect the change. Accordingly, we will make the change in the FM Table of Allotments at the conclusion of this proceeding to reflect that Channel 257C3 is allotted at Shasta Lake City in lieu of Central Valley. We will serve QBC with a copy of this *Notice*.

[3] *See* footnote 2, *supra*.

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

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5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-77

In the Matter of

Billed Party Preference
for 0+ InterLATA Calls

FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: May 19, 1994 **Released: June 6, 1994**

Comment Date: July 8, 1994
Reply Date: July 29, 1994

By the Commission: Commissioner Quello concurring and issuing a statement; Commissioner Barrett issuing a statement.

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I. INTRODUCTION

1. In May 1992, the Commission released a Notice of Proposed Rulemaking to consider the implementation of a "billed party preference" (BPP) system for 0+ interLATA payphone traffic and for other types of operator-assisted interLATA traffic.[1] Under BPP, such traffic would be carried automatically by the operator services provider (OSP) preselected by the party being billed for the call. In the *Notice*, we tentatively concluded that, in concept, BPP routing of all 0+ interLATA calls is in the public interest, and we sought comment on the costs and benefits of BPP.

2. Our review of the evidence in the record and other publicly available data indicates that BPP, if implemented within the parameters discussed below, would serve the public interest. BPP would facilitate access to the telephone network by eliminating the need for callers to use access codes on operator service calls. BPP would also stimulate competition in operator services both by eliminating AT&T's advantages in the operator services market and by refocusing operator services competition more squarely on consumers. Heightened, more consumer-oriented competition should result in lower prices and better services, which, coupled with easier access, should stimulate network usage. Moreover, the technology required for BPP would enrich the nation's telecommunications infrastructure, paving the way for further network innovation. Nevertheless, BPP is an expensive technology. In addition, the data, including the cost data, on which we rely is not as precise or as current as we would like. Therefore, before issuing a final decision, we invite parties to comment on our analysis of the benefits and costs of BPP. We will mandate BPP only if we conclude that, as indicated by the current record, its benefits outweigh its costs and that these benefits cannot be achieved through alternative, less costly measures. Parties suggesting alternatives to BPP should describe those alternatives with specificity so that we may adequately assess their costs, benefits, and feasibility in relation to BPP. We intend to proceed expeditiously with our review of the record and issue a final decision at the earliest possible date.

II. BACKGROUND

3. O+ interLATA calls from payphones, hotels, motels, and other aggregator locations are routed today to the OSP chosen by the premises or payphone owner.[2] OSPs generally compete to receive such traffic by offering commissions to payphone or premises owners on all 0+ calls from

[1] Billed Party Preference for 0+ InterLATA Calls, Notice of Proposed Rulemaking, CC Docket No. 92-77, 7 FCC Rcd 3027 (1992) (*Notice*). A 0+ call occurs when the caller keys in plus an interexchange number, without first using a carrier access code. An access code is a sequence of numbers, *e.g.*, 10288, that connect the caller to the carrier associated with that sequence.

[2] Prior to 1988, all 0+ traffic from Bell Operating Company (BOC) and GTE payphones was routed to AT&T. In October 1988, Judge Greene ordered the BOCs to implement a presubscription system for BOC payphones, and shortly thereafter, he ordered GTE to do the same. In these orders, Judge Greene stated that a BPP system would be most consistent with the divestiture decree, but he recognized that it was not viable at the time. Still, he stated his expectation that the BOCs would continue expeditiously to perfect a line identification database (LIDB) system, which would permit BPP. United States v. Western Electric Co., Inc., 698 F. Supp. 348, 367 (D.D.C. 1988).

a public phone "presubscribed" to them.[3] To maximize commission revenues, and in some cases to prevent fraud, some aggregators blocked the use of access codes for "dialing around" the 0+ carrier from their phones. Congress responded to this by enacting the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), pursuant to which the Commission has required payphone providers to permit callers to use access codes to reach their preferred carriers.[4]

4. While the Commission's orders pursuant to TOCSIA have addressed some of the most serious problems presented by a presubscription system of equal access for public phones,[5] we observed in the (*Notice* that other problems remain. In particular, we noted that many callers find dialing requirements for operator service calls to be burdensome and confusing.[6] We also observed that a presubscription system inherently favors the OSP with the most traffic, and that, to a significant degree, competition under presubscription benefits premises owners and payphone providers more than end users. It was largely because of these disadvantages of presubscription that the *Notice* tentatively concluded that, in concept, BPP was in the public interest.[7]

5. Under BPP, 0+ calls would be carried automatically by the OSP predesignated by the billed party. To identify the billed party's OSP, local exchange carriers (LECs) would initially route such calls to a LEC operator service switch (OSS).[8] From there the handling of the call would vary, depending on the nature of the call and the billing vehicle. For interLATA collect calls, as well as interLATA calls billed to third numbers or line-number based calling cards,[9] LECs would launch a query from the OSS to a LIDB via common channel signaling (SS7) to identify the OSP predesignated by the party to be billed.[10] For calls billed to a calling card in the CIID or 891 format[11] or to a commercial credit card, LECs would identify the OSP or the database to be queried for routing instructions at the OSS (without a LIDB query) based on the first six digits of the calling card number.

6. Once the preferred OSP was identified, the call would be sent to it. In addition, any billing data collected by the LEC -- such as calling card number -- would be sent to the OSP via OSS7,[12] if the OSP could receive OSS7 data. (If the OSP could not receive OSS7 data it would need to request billing information from the caller again.) The OSP operator system would be responsible for validating OSP

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[3] "Public phones" refers here to payphones and other aggregator phones, including hotel phones. Under the Communications Act, as amended, an aggregator is "any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services." 47 U.S.C. §226(a)(2).

[4] *See*, 47 C.F.R. §64.704 (1992), adopted pursuant to Pub. L. No. 101-435, 104 Stat. 986 (1990) codified at 47 U.S.C §226. The Commission has required unblocking of all payphones. Other aggregator phones must also be unblocked, except for equipment that was manufactured or imported before April 17, 1992 and cannot be modified to permit access code dialing for less than fifteen dollars per line without creating a significant danger of toll fraud. Commission rules do not require these phones to be unblocked until April 17, 1997. *See* 47 C.F.R. §64.704(c)(5).

[5] *See, e.g.*, Policies and Rules Concerning Operator Service Providers, Report and Order, CC Docket No. 90-313, 6 FCC Rcd 2744 (1991). In the Final Report of the FCC Pursuant to the Telephone Operator Services Improvement Act of 1990, Nov. 13, 1992 (*TOCSIA Report)*, we found that over ninety percent of telephones complied with our TOCSIA consumer protection requirements. We concluded that these requirements were effective in providing consumers the opportunity to reach their carrier of choice through access codes and thereby avoid the high rates charged by some OSPs. We recognized, however, that some calls are still routed to carriers that charge high rates. *See* para. DIFF1911, *infra*. We also found that these rates are in many cases driven by higher costs -- and, in particular, the higher commissions these carriers must pay to aggregators under a presubscription system of equal access. As discussed below, BPP would remedy these remaining problems. It would guarantee that all callers would always reach the preferred carrier, while simplifying dialing requirements on operator service calls. In addition, it would most likely eliminate the commissions that increase OSP cost structures (although there would be some offsetting increase in payphone compensation) and redirect operator services competition towards consumers and away from aggregators. Thus, while TOCSIA and our implementing rules provided significant benefits to the public, given existing network technologies, BPP would yield additional benefits.

[6] *Notice*, 7 FCC Rcd at 3030.

[7] In the *Notice*, the Commission also sought expedited comment on a proposal to address the competitive inequities created by the use in a presubsciption system of proprietary calling cards, that is, calling cards that can be validated only by the card issuer. Specifically, the Commission sought comment on whether, pending implementation of BPP, it should require IXCs to share with other IXCs, billing and validation data for any calling card usable with 0+ access. In Billed Party Preference for 0+ InterLATA Calls, Report and Order and Request for Supplemental Comment, CC Docket No. 92-77, Phase I, 7 FCC Rcd 7714 (1992), *recon. pets. pending*, the Commission concluded that the costs of this proposal outweighed the benefits. However, the Commission also stated that if it did not adopt BPP, it might reconsider whether further action would be needed to address any remaining problems in the operator services market.

[8] *Notice*, at 3027-29; *See* Joint MCI, GTE, Pacific, SW Bell *ex parte* filing, Dec. 23, 1993 presenting a detailed BPP service description that is agreeable to all four parties.

[9] Under current LEC plans, LIDB queries would be ten-digit in nature. Thus, there could be only one line number calling card for each line. If BPP plans were modified to permit 14-digit screening, LECs would be able to differentiate among line number cards based on the personal identification number (PIN), thereby allowing multiple line number cards for each line. LECs maintain, however, that 14-digit screening would be substantially more expensive to administer. *See infra* Section IV.D.

[10] LECs would load into LIDB a primary and secondary OSP choice for each telephone line. Secondary choices would be used when the primary carrier, *e.g.*, a regional carrier, was unable to handle the call. The LIDB response to the OSS would include the secondary OSP choice as well as the primary, so that the former could be used if the latter carrier could not receive the call.

[11] An 891 card, consistent with the International Telegraph and Telephone Consultative Committee (CCITT) standards, contains up to nineteen digits. Its first three digits indicate that the card is from the North American Numbering Plan area. The next three digits identify the card issuer. A "Card Issuer Identifier" (CIID) card is a fourteen-digit non-line number based card, the first six digits of which identify the card issuer.

[12] OSS7 is an operator services version of SS7 software containing the additional fields needed to provide operator services (*e.g.*, calling card number). It would be used to transmit information from the LEC end office to the LEC OSS, and from the LEC OSS to the OSP receiving the call.

CIID and 891 cards and obtaining acceptance on collect and third party billed calls. Line number cards would continue to be validated in LIDB.

7. Most operator service calls would be handled on an automated basis through "Automated Alternate Billing Service" (AABS) systems, which many LECs have already deployed and which would be expanded to handle the increased load of BPP calls.[13] Proponents of BPP have urged its application to 0- as well as 0+, calling card, collect, and third party billed calls.[14] BPP would not alter the current routing of access code, 1+, 00-, or calls billed to foreign line numbers.[15]

III. COSTS AND BENEFITS OF BILLED PARTY PREFERENCE

8. Based on the record and other publicly available information available to us, we believe that the benefits of BPP are significant and outweigh its costs. Our evaluation of the costs and benefits of BPP is based on data submitted by the parties and the best publicly available data from other sources. When possible, we have sought to quantify the benefits in dollars to help judge whether consumers would value the benefits above the costs. For purposes of this analysis, we have assumed that BPP, if mandated, would be implemented in June 1997.[16] We seek comments on our analyses of both costs and benefits.

A. Benefits

9. BPP would provide three principal benefits. First, it would facilitate access to the telephone network by simplifying calling card, collect, and third party billed calling. Callers would no longer need to use access codes, they would no longer find their OSP cards rejected at certain payphones,[17] and their calls would automatically be carried by the OSP preferred by the billed party, rather than that chosen by the premises owner. Second, BPP would lead OSPs to refocus their competitive energies on serving end users rather than paying commissions for the 0+ traffic from public phones. Third, it would enable at least some of AT&T's competitors to compete more effectively for customers who prefer not to use access codes. As explained more fully below, the first two benefits would appear to generate roughly $620 million annually in gross quantifiable savings. A more competitive market structure should also lead to lower prices and better services, though we have not quantified this or a number of other benefits we discuss below.[18]

1. BPP would eliminate the need for access codes and guarantee routing by the billed party's preferred carrier.

10. *Avoiding the inconvenience of using access codes.* According to the *TOCSIA Report*, an estimated one-third of operator service calls were made via access codes in 1991.[19] BPP would benefit these access code users by saving them the trouble of entering the extra digits of an access code before each call. It would also eliminate the possible time and trouble that some face in remembering their carrier's access code or having to retrieve their calling card instructions each time they make a calling card call. While we suggested in the *Notice* that callers may become more comfortable with access codes over time, and that the value of this benefit may thus diminish over time, we believe that the likely replacement of 10XXX access codes with 101XXXX codes in 1995 may further confuse callers and add to the burdens of access code dialing.[20] Callers who use 0+ on phones presubscribed to their preferred carrier would also avoid having to determine whether they needed to use an access code.[21] We seek comment on the extent to which consumers find access codes confusing or conve-

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[13] LECs, as well as OSPs, have been deploying AABS systems in place of live operators. These systems provide instructions to and solicit information from callers via automated prompts. For example, a tone signifies that the caller should enter a calling card number, and a second tone or a recorded voice instructs the caller to identify collect or third party calls, possibly by keying in particular digits.

[14] A 0- call occurs when the caller dials " with no additional digits. 0- calls are currently routed to the LEC operator in most states. In those instances, if the caller wishes to place an interLATA call, the LEC operator will instruct the caller to hang up and redial using either 0+ or a carrier access code. Alternatively, the LEC operator might ask the caller to choose a long-distance carrier and transmit the call to that carrier.

[15] A 00- call occurs when a caller enters the digit twice with no additional digits. 00- calls are routed to the OSP presubscribed to the originating line.

[16] For a fuller discussion of the timing of implementation, *see*, section IV.G., *infra*.

[17] 0+ calls made with a proprietary OSP calling card from a phone presubscribed to another OSP are currently rejected by the presubscribed OSP.

[18] A study commissioned by CompTel concludes that BPP would alter the routing of only about nineteen percent of operator service calls. CompTel *ex parte* filing, Nov. 22, 1993 (*CompTel study*). Even assuming that this number is approximately correct, BPP would save consumers hundreds of millions of dollars on those calls. *See*, para. DIFF1911, *infra*. Moreover, the assumption in that study -- that BPP provides benefits only to the extent it alters the routing of operator service calls -- is, in our view, incorrect. Rather, we believe that all consumers would benefit from simplified dialing requirements that guaranteed them access to the billed party's carrier of choice. In addition, consumers would benefit from increased price competition for customer traffic in the operator services marketplace and from the elimination of commissions that inflate OSP cost structures and are presumably reflected in OSP rates.

[19] The industry-wide dial-around figures can be estimated for 1991 from data in the *TOCSIA Report*, at 30-31 and Attachment N, Table 4, at N-17 (*TOCSIA Report Table 4*).

[20] Pennsylvania PUC Comments at 5 n.3; Sprint Reply Comments at 6; *See*, Administration of the North American Numbering Plan, Notice of Proposed Rulemaking, CC Docket No. 92-237, FCC 94-79, paras. 48-50, (released Apr. 4, 1994).

[21] Several commenters agree that many consumers find access codes inconvenient. Ameritech Reply Comments at 16-17; Indiana & Pennsylvania Consumers Comments at 14; Mastercard/Visa Comments at 10-11; MCI Comments at 4-5; Michigan PSC Comments at 2; Midwest Regulators Comments at 7; Pacific Comments at 8 (many callers now believe that a LEC credit card ensures the use of their preferred OSP); Pennsylvania PUC Comments at 3-5. According to focus group research conducted by Pacific, "81% of card holders who need to dial access codes are interested in having 0+ access on their cards." Pacific also found that "dialing convenience is a most important card attribute for a majority of card holders." Pacific Comments at 8. *But see* BellSouth Comments at 9 (claiming that a July 1991 Bellcore survey found that callers do not view access codes as a significant burden, but failing to provide further detail about that survey).

nient. We also seek comment on the extent to which consumer acceptance of access codes is likely to change over time.

11. *Guaranteed automatic routing to the customer's preferred carrier.* Callers who cannot or do not use access codes from public phones would gain the most significant benefits from BPP. These callers would no longer be frustrated by having their only calling card rejected at a particular telephone because the presubscribed OSP could not validate a proprietary card of a different OSP. In addition, many callers could save a significant amount in operator service charges. In today's presubscription environment, 0+ calls may be routed to carriers that charge rates that are considerably higher than the industry average. IFF Indeed, according to the *TOCSIA Report,* AT&T, MCI, and Sprint charged, on average, $.34 per minute for an operator service call in 1991, while third-tier OSPs charged, on average, $.53 per minute, or $.19 per minute more.[22] Since under BPP, consumers would not likely presubscribe to an OSP that charged high rates, BPP would, we believe, force OSPs either to lower their rates or lose 0+ traffic.[23] Based on data in the TOCSIA Report, even assuming that BPP would not apply to any intraLATA calls, we estimate that consumers could save approximately $280 million per year by avoiding the highest-priced OSPs.[24] We seek comment on this analysis and on whether data in the TOCSIA Report reflects the current rate differential between AT&T/MCI/Sprint and other OSPs.

2. OSPs would refocus their competitive efforts on end users rather than on commission payments to premises owners.

12. By transferring the ability to choose the OSP for a 0+ interLATA call from the premises owner or payphone provider to the end user, BPP would benefit consumers in two ways. First, BPP would force OSPs to redirect their competitive efforts away from aggregators and toward end users. This shift in focus would likely result in lower prices and better service. Second, BPP would almost certainly eliminate 0+ commissions and thus significantly reduce OSP costs, thereby offsetting a substantial portion of the costs of BPP itself. The TOCSIA report indicates that OSPs paid approximately $500 million in commissions to premises owners and payphone providers on 0+ interLATA and intraLATA toll calls in 1991. We estimate that by 1997, the annual savings on interLATA 0+ commissions would be approximately $340 million.[25]

13. We understand that consumers may not realize all of these savings. In particular, we understand that some aggregators might seek to recover lost commission payments through direct surcharges on end users for telephone

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[22] *TOCSIA Report Table 4.* The average rates we use here reflect actual OSP revenues for six sample third-tier OSPs who earn approximately 40% of third-tier OSP revenues. *TOCSIA Report* at Attachment N, N-12.

[23] As with 1+ service, some OSPs might well offer rates below the largest carriers, but no attempt has been made to quantify the additional benefits to consumers from OSP prices below, rather than simply at, current competitive levels.

[24] *TOCSIA Report Table 4* indicates that third-tier OSPs earned $1.2 billion in revenues in 1991. Since, as shown in note DIFF21, *supra,* the $.53 per minute these OSPs charged was, on average, $.19 per minute more than the average rate for AT&T, MCI, and Sprint, approximately 36% ($.19$.53) of this $1.2 billion ($430 million) are revenues attributable to amounts third-tier OSPs charged in excess of the composite AT&T, MCI, and Sprint rate.

To estimate this revenue differential for 1997, we make two adjustments. First, we adjust for traffic growth between 1991 and 1997. We assume a 4.3% growth rate, based on FCC data showing a 4.3% historical growth trend rate for toll traffic revenues from 1984-1992. Long Distance Market Shares at 12 (FCC Common Carrier Bureau, Industry Analysis Div., Sept. 1993). Second, to be conservative, we assume that the market share of third-tier OSPs will decline as callers increasingly dial around those third-tier OSPs with the highest rates. We assume, for purposes of this analysis, that between 1991 and 1997, the combined market share of third-tier OSPs will drop by about one third -- from 12.7% of the minutes for away-from-home calls (see *TOCSIA Report,* Graph 2, at N-15) to 8.5% of away-from-home minutes. Applying these adjustments, we project that, in 1997, third-tier OSPs will receive $370 million in charges above the composite AT&T, MCI, and Sprint rate. We then assume that 23.8% of this differential would be attributable to intraLATA calling (*TOCSIA Report Table 4* shows that 47.5% of third-tier OSP revenues are intrastate and we assume half of that is intraLATA) and adjust accordingly.

[25] We derive this figure as follows: *TOCSIA Table 4* estimates 1991 operator service revenues from aggregator phones at $6.1 billion, approximately $1.2 billion of which was third-tier OSP revenue. To estimate 1997 0+ revenues, we make the following adjustments. We first adjust 1991 revenues to account for overall growth in operator service revenues between 1991 and 1997. We assume a 4.3% annual growth rate, *see* note GROWRATE24, *supra,* and thereby derive a revenue figure of $7.9 billion in 1997, $1.5 billion of which would be third-tier OSP revenues. We next adjust these numbers to account for our assumed shift in traffic from higher-priced OSPs to lower-priced OSPs between 1991 and 1997. If this shift occurs, actual 1997 operator service revenues will approximate $7.7 billion. (We derive this figure by assuming that one third of anticipated third-tier OSP revenues in 1997 would be priced at the AT&T/MCI/Sprint average rate, rather than higher third-tier rates.) We then assume that 18.1% of these revenues are from intraLATA calls (*TOCSIA Report Table 4* shows that 36.3% of OSP revenues are intrastate and we assume half of that is intraLATA). In addition, to be conservative, we assume that the dial-around rate will increase to 50% by 1997, leaving $3.2 billion in interLATA 0+ revenues. We next calculate from *TOCSIA Table 4* that 1991 0+ commission payments averaged about 12% ($500 million$4.1 billion) of 0+ revenues from aggregator phones. We apply this rate to anticipated 1997 0+ interLATA revenues to arrive at $380 million in estimated commission payments.

We then make two additional adjustments. First, we assume for purposes of this analysis that compensation paid by OSPs to competitive payphone providers (CPPs) will double from $6 per phone per month to an average of $12 per phone per month. *See* note PAYCOM253, *infra.* This would reduce 0+ commission savings by about $22 million per year to about $360 million. Second, we subtract commissions that would otherwise be paid on the $280 million in third-tier OSP revenues that we estimated would disappear due to BPP, *see* note GROWRATE24, *supra.* This would reduce 0+ commission savings by an additional $17 million to about $340 million. For a more detailed explanation of these calculations, *see* Appendix B.

usage. On the other hand, it appears that the hotel/motel industry has found such surcharges to be harmful to customer goodwill, and this could deter them from using surcharges to replace lost commissions.[26] We also recognize that premises owners could seek to recover lost commissions through higher prices for other goods and services. For example, hotels could raise their room rates, or restaurants with payphones could raise menu prices. Yet if the prices of other goods and services were already subject to competitive pressures or set at a profit-maximizing level, this option would be limited. Even if premises owners were able to recover their lost commissions from higher prices of other goods and services, BPP would still benefit consumers by generating more efficient pricing. In particular, BPP would prevent premises owners from using artificially high operator service rates to cross-subsidize artificially low prices for other goods and services.[27]

3. Competitors of AT&T would be able to offer end users the same 0+ access as AT&T.

14. Due to AT&T's large customer base and its use of a proprietary calling card, it has an advantage in competing for presubscription contracts with payphone providers and other aggregators. Specifically, it can pay a lower commission rate, but still offer higher overall commission payments.[28] This presubscription advantage confers two corresponding benefits. First it increases AT&T's share of operator services traffic since the presubscribed OSP receives all 0+ calls from the phone. Second, it enables AT&T to hold itself out as the only long distance carrier that can offer simple 0+ dialing as a practical option. If any of AT&T's competitors were to encourage customers to attempt 0+ calls using their IXC cards, those customers would probably become annoyed at the high rejection rate for those calls. AT&T's competitors have claimed that their inability to offer 0+ calling with their own calling cards has had an adverse impact on their interexchange business generally by strengthening the perception that AT&T offers superior service.[29]

15. BPP would eliminate these AT&T advantages. It would give all carriers the same opportunity to compete for 0+ traffic. It would also give MCI, Sprint, and others the ability to offer customers the same 0+ calling option that AT&T offers and that many customers appear to prefer.[30]

4. Other benefits

16. BPP would also produce other cost savings. For example, it would reduce regulatory costs. The FCC and state commissions have received many complaints about OSP rates.[31] BPP would significantly reduce the incidence of such complaints and any need to regulate OSP rates more actively. In addition, by eliminating AT&T presubscription advantages, BPP might enable the Commission to streamline regulation of AT&T's operator services. BPP could also reduce the need to police compliance with TOCSIA by eliminating the incentives for premises owners to block access code calls and by diminishing the importance of the TOCSIA call branding and notice requirements.

17. BPP would also likely reduce OSPs' costs of collections and uncollectables since OSPs would generally be billing only their presubscribed customers and not one-time callers, while consumers would no longer receive bills for 0+ calls from unknown carriers with unfamiliar rates

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[26] According to a July 25, 1993 story in *The Washington Post*, Hilton Hotels is the latest and largest of the major lodging chains to eliminate direct surcharges for guests who use a calling card, and several other hotel chains say they are considering a similar move. Hilton's senior VP for marketing cited calling card access fees as "the biggest source of customer complaints at full-service hotels." Hilton estimates that the policy will cost the chain several million dollars in the short term, but it hopes for increased guest satisfaction and loyalty. Stouffers and Embassy Suites do not charge fees today, and Sheraton and Marriott are both studying the policy. James Yenckel, "Fearless Traveler: Phoning Home: Hotel Fees," *The Washington Post*, July 25, 1993 at E6.

[27] The *CompTel study* concludes, without substantiation, that there would be no 0+ commission savings under BPP because of increased payphone compensation and surcharges assessed by aggregators. The study also suggests that consumers would not benefit by depriving public institutions of commissions, since those institutions use those commissions to provide public services. This study, however, assumes that the Commission would increase payphone compensation payments by $42-60 million per year under BPP, while, as explained in Appendix B, an increase of about $22 million would be consistent with the rationale of the *Payphone Compensation Order*. *See* note PAYCOM253, *infra*. The *CompTel study* also assumes that aggregators will not be constrained by market pressures in recovering their lost commissions. Moreover, for the reasons stated above, we reject the notion that consumers would not benefit from a reduction in commission payments to aggregators, even if those payments are otherwise recovered or had been made to public institutions.

[28] As indicated in the *Notice*, AT&T's introduction of a proprietary calling card secures this advantage. All OSPs can pay commissions on 0+ calls made with a LEC calling card. According to Pacific, 45% of all calling card calls are made with a LEC card. Pacific *ex parte* filing, Jun.25, 1993. All OSPs can also pay a commission on collect and other non-calling card calls. Only AT&T, however, pays a commission on the 0+ calls made with an AT&T proprietary calling card. According to Pacific, 35% of all calling card calls are made with an AT&T proprietary card. *Id.* While other OSPs have issued their own proprietary cards, these cards are used far less often (20% of the time in the aggregate, according to Pacific, *id.*). Moreover, these cards generally instruct callers to use access codes because of the small likelihood that dialing 0+ will be successful with them. Therefore, AT&T is able to win presubscription agreements against other competitively priced OSPs even when offering the payphone premises owner a lower commission rate.

[29] Competition in the Interstate Interexchange Marketplace, Report and Order, CC Docket No. 90-132, 6 FCC Rcd 5880, 5884 (1991).

[30] Of course, there is no guarantee that OSPs would promote 0+ calling in a BPP environment. If the cost of BPP were recovered only from 0+ calls some carriers might promote access code calling as a cheaper alternative to 0+ calling. Others might focus on the 1-800 debit card market. Nevertheless, many customers appear to have a strong preference for 0+ calls, as discussed in section III.A.1., *supra*.

[31] We continue to receive large numbers of complaints despite our TOCSIA rules. Indeed, whereas from April to September 1990, just prior to the enactment of TOCSIA, we received 851 operator service complaints, over that same six month period in 1992 and 1993, we received 1,377 and 1,373 operator service complaints, respectively. FCC, Common Carrier Bureau, "Consumer Complaints and Inquiries About Common Carrier Issues." 1990, 1992, 1993. The Florida and Texas Commissions also report problems under current rules. Florida PSC Comments at 3-4; PUC of Texas, *ex parte*, filing Feb. 23, 1994.

(which they might not be inclined to pay).[32] Furthermore, the new facilities installed for BPP, including OSS7 in the end office, would enhance the communications infrastructure by improving the signaling capabilities of the network, facilitating the introduction of new services, and increasing efficiency in the provision of existing services. Although major LECs other than Ameritech may lack current plans for developing new services that depend on OSS7 in the end office, this capability could aid in the provision of other forthcoming services, such as Customer Local Area Signaling Services (CLASS) services on operator service calls.[33]

18. We invite comment on our analysis of the benefits of BPP and the assumptions underlying this analysis. We urge parties disputing our analysis or data to submit empirical data to support their claims. Particularly relevant would be data on consumer acceptance of access code dialing and on the value to consumers of being able to reach their preferred carrier without using access codes. Also relevant would be data on any impact of wireless or other new technologies. We especially encourage consumer groups to comment on our assessment of the benefits of BPP.

19. As discussed above, in estimating the benefits of BPP, we have assumed that, if mandated, BPP would apply only to interLATA traffic and that 0+ intraLATA traffic would continue to be routed to LECs. If states extended BPP to intraLATA traffic as well, the benefits of BPP could be significantly augmented. A number of state public utility commissions support BPP and urge us to adopt it.[34] In the event we mandate BPP we would encourage all states to extend its application to all intraLATA traffic to maximize the benefits of BPP.

B. Estimated Costs of BPP

1. Cost of implementing and administering BPP

20. To implement and operate BPP, LECs, and to a lesser extent OSPs, would be required to make substantial network modifications. LECs have submitted data on the costs of these modifications, but these data are not as reliable as we would like, primarily for three reasons. First, some equipment vendors have been unwilling to offer prices without a more detailed explication of LEC requirements.[35] Second, some of the software needed for BPP has not yet been developed. Third, LECs do not know the extent to which they will be able to obtain discounts that they customarily receive from vendors.[36] Based on the available data, LECs estimate that their costs would approximate $1.1 billion in nonrecurring charges and $60 million in annual recurring expenses.[37] These estimates translate into an amortized pre-separations annual cost of approximately $380 million. As discussed below, we estimate that total OSP costs would be approximately $35 million per year, yielding a total estimate for BPP modifications of about $420 million per year.

21. *LEC costs.* LEC costs would fall into three broad categories. The single largest category would include costs for end office software needed for BPP. This software would enable LECs to perform "route splitting" (routing access code and 00- calls directly to OSPs, while routing 0+ and 0- calls to the LEC OSS). It would also enable them to transmit to the OSS the identity of the OSP presubscribed to the originating line. LECs would use this information for routing calls billed to foreign numbers (which would not be subject to BPP) and in the event the primary and secondary carrier were unavailable. LECs claim they would have to deploy OSS7 in their end offices to perform these functionalities.[38] LEC cost estimates for this software total about $480 million.[39]

22. The record is unclear on the extent to which OSS7 costs should be recovered from BPP. Ameritech argues that OSS7 would be used for a host of new services and that it would only seek to recover the costs of accelerating OSS7 to accommodate BPP. Pacific suggests that some OSS7 costs could be allocated to other services. MCI goes further and argues that OSS7 is a general network upgrade, none of the costs of which should be loaded into a BPP rate element. On the other hand, no other LECs indicate that they have any other expected use for OSS7. Likewise, the Missouri PSC asserts that if OSS7 is needed for BPP, OSS7 costs should be recovered from BPP.[40]

23. We seek comment on the extent to which OSS7 costs would be treated as BPP costs if we mandate BPP and, in particular, on the need for and possible other uses of OSS7. For purposes of our current cost/benefit analysis, however, we assume that the entire estimated cost of about $480 million for providing OSS in the end office would be attributable to BPP.

24. A second category of LEC BPP costs would include costs of increasing LEC operator service capabilities. Under BPP, 0+ calls currently routed to the presubscribed OSP would instead be routed to LEC operator positions for at

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[32] Ameritech Comments at 20.

[33] Examples of CLASS services include Caller ID, which permits the called party to display the caller's phone number, and Selective Call Forwarding, which permits the called party to forward only calls received from a selected set of phone numbers.

[34] *See, e.g.*, Florida PSC Comments at 1; Michigan PSC Comments at 2; Midwest Regulators Comments at 7,8; Missouri PSC Comments at 1; New York DPS Reply Comments at 1; Texas PUC Comments at 1.

[35] *See, e.g.*, Ameritech Comments at 18; Bell Atlantic Comments at Attachment A; Pacific Comments at 19.

[36] Some BOCs have noted that they are generally able to negotiate significant discounts from their vendors for new hardware and software, but that these discounts were not included in their cost estimates. *See, e.g.*, BellSouth *ex parte* filing, June 23, 1993; SW Bell *ex parte* filing, June 3, 1993.

[37] In citing these estimates we do not imply that these costs are reasonable or properly attributable to BPP. These matters would be addressed in the tariff review process.

[38] While it appears that certain types of switches can perform these functions without OSS7, LECs maintain that in most switches, little savings could be achieved by using multi-frequency (MF) software in lieu of OSS7. LECs also argue that it would make no sense to spend large amounts of money on new MF software, given the superior capabilities of OSS7. *See* Pacific *ex parte* filing, July 6, 1993; Ameritech *ex parte* filing, July 8, 1993.

[39] *See, e.g.*, SW Bell Reply Comments at 6: item 5 ($103.5 million); USTA *ex parte* filing, July 20, 1993 ($86.7 million); US West *ex parte* filing, Aug. 16, 1993 (75.5 million); BellSouth Comments at Exhibit 1 ($72.3 million); NYNEX *ex parte* filing, Apr. 28, 1994 (48.5 million).

[40] Ameritech *ex parte* filing, June 10, 1993; MCI *ex parte* filing, June 8, 1993; Missouri PSC Comments at 3; Pacific *ex parte* filing, July 6, 1993.

least preliminary processing to determine the billed party's preferred carrier. In addition, the BOCs expect that most calls now made using access codes would become 0+ calls and therefore would have to be processed at LEC operator positions. Providing the live and automated operator services for this additional traffic would require LECs to add more operator positions and consoles, provide additional training, and employ more operators. LECs estimate this would cost about $120 million per year in recurring costs and about $180 million in nonrecurring costs.[41]

25. Most of these costs, however, would be due to a shifting of functionalities from the OSP networks to the LEC networks.[42] Therefore, most of these costs would be offset by cost savings to OSPs. For the purposes of this analysis, we estimate that at least 75% of the recurring costs, *i.e.*, operator salaries, and at least half of the AABS and operator related non-recurring costs would be offset by cost reductions to OSPs. In calculating the net costs of BPP, therefore, we exclude these portions of the LEC cost estimates.

26. The third category of LEC costs comprise all of the remaining additional expenses associated with LEC implementation of BPP. These include $280 million for software modifications to operator switches and $130 million for trunk terminations and rearrangements, for a total of approximately $550 million in nonrecurring costs. In addition, LECs estimate additional recurring costs of about $30 million annually for BPP carrier updates, maintenance, and other similar services.

27. Adding these three categories together yields an estimated net cost for LEC modifications of about $1.1 billion in nonrecurring costs and approximately $60 million per year in recurring costs. Amortizing the non-recurring costs yields an annual cost of approximately $320 million/yr,[43] and thus the total LEC cost of BPP modifications, net of the offset for OSP operator cost savings, would be approximately $380 million/yr. Some LECs would also seek to apply overhead loading factors to these costs.[44]

28. *OSP costs.* OSPs accepting 0+ calls would also have to modify their networks. AT&T estimates that BPP would require it to spend at least $68 million in non-recurring costs,[45] MCI $19.5 million,[46] and Sprint about $6.5 million for network modifications.[47] No other OSP/IXC offers any cost estimate, but extrapolating from the former figures, we assume that total OSP costs would not exceed $120 million or about $35 million per year (exclusive of LEC charges to recover the BPP costs described above).[48] We seek comments on this estimate and encourage OSPs to describe with specificity their BPP-related costs.

2. Effect on Quality of 0+ service.

29. Opponents of BPP argue that it would adversely affect service quality. They argue that callers would have to provide billing information, such as their calling card number, twice -- first to the LEC, so that the LEC could use it to identify the preferred carrier, and then to the OSP so that it could bill the call.[49]

30. These arguments appear to be generally overstated. While BPP would require a 0+ call to go through two operator systems, LECs would be able to transmit to OSPs the information they receive from a caller, thereby obviating the need for the caller to repeat that information to the OSP.[50]

31. Opponents of BPP also argue that BPP would increase access time for 0+ calls. These parties, however, do not substantiate their assertions and several parties dispute

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[41] *See* Appendix C.

[42] In particular, LECs would determine the nature of the call (calling card, collect, or third party billed) and the line or calling card to be billed, functions currently performed by the OSP. OSPs would only need to handle call acceptance for collect and third party calls and validation for OSP calling card calls. Because LECs would be able to signal the information they collect to OSPs with SS7 capabilities, BPP would reduce operator related costs for most OSPs.

[43] The record indicates that LECs would seek to amortize their non-recurring capital investments and expenses by requesting a recurring charge of approximately 29% of their non-recurring expense. For example, Ameritech estimates its total nonrecurring expenses would be $48.8 million and translates that into an annualized expense of $13.9 million (28.5%). Ameritech *ex parte* filing, July 8, 1993. Similarly *see* BellSouth: non-recurring costs of $24.936 in capital and $120.681 in other expenses would translate to 6.982 and 34.997 million in annual costs, respectively, (.28 and .29). BellSouth Comments at Exh. 1 & 2. *See also*, GTE (estimated annual charge factor of 30%), GTE *ex parte* filing, Aug. 24, 1993; SNET: capital costs of $6, $13, and $1 million would translate into annual expenses of $1.8, $3.9, and $.3 million (all .30). SNET *ex parte* filing, Jun. 18, 1993. This annual charge factor would permit LECs to recover expenses over five years and principal, interest, and other related costs of capital investments over their life expectancy.

[44] LECs have indicated that they would request overhead loadings in the neighborhood of 25%. *See, e.g.*, Ameritech *ex parte* filing, Dec. 2, 1993 (30%); GTE *ex parte* filing, Aug. 24, 1993 (6% already included in estimates); Pacific *ex parte* filing, Sept. 20, 1993 (10%); and SW Bell *ex parte* filing, Jan. 5, 1994 (22%).

[45] AT&T estimates that it would be required to spend $30 million in development costs to modify its operator services positions system (OSPS) switching equipment to handle SS7 protocol data for BPP; $10 million to develop call processing software for that same system so that it could operate with the call detail provided through the SS7 protocol; and $14 million for trunk reconfigurations, particularly rearrangements. In addition, AT&T estimates $8 million for trunk upgrades, and $6 million for additions to its signaling links. It also indicates that it would require an additional $20 million if it is required to create an MF interface in addition to an SS7 interface to handle BPP traffic from independent LECs that are unable to arrange to employ OSS7 and AABS systems to handle their traffic. AT&T Comments at 12-15; Reply Comments at 9-10.

[46] MCI estimates $6 million for software development and $13.5 million for hardware deployment and rearrangements. MCI *ex parte* filing, July 16, 1993. MCI does not further elaborate on the nature of these costs.

[47] Sprint *ex parte* filing, August 12, 1993.

[48] If $120 million in OSP BPP costs are amortized over five years, they would represent an additional annual cost of about $35 million per year, using the same 5-year amortization factor as used above for LEC expenses. *See* note FACTOR43, *supra*.

[49] *See, e.g.*, APCC Comments at 21-23; Arizona DOC Comments at 6-7; CompTel Reply Comments at 14-18, 21-22; Harvard Comments at 1; Elcotel Comments at 1; LinkUSA Comments at 17; US Long Distance Comments at 10-11.

[50] LDDS *ex parte* filing, Dec. 22, 1993. Larger LECs include the costs of this capability in their cost estimates. Cost estimates submitted by USTA on behalf of smaller independents LECs assume that those LECs will either deploy OSS7 at their own operator switch or send their BPP calls to another LEC that has that capability. USTA *ex parte* filing, Nov. 16, 1993.

them.[51] We note also that BPP would decrease the time it takes to dial a call by eliminating the need for access codes, and that callers would receive instructions from the LEC during the call set-up period, which would reduce the incidence of call abandonment. Based on the record, therefore, we tentatively conclude that BPP should not materially degrade the quality of operator services.

3. Effect on competition in certain market sectors

32. While we believe that BPP would generally increase competition, we recognize that some OSPs might find it harder to compete in a BPP environment. In particular, OSPs that were able to obtain presubscription contracts by offering high commissions, but that do not offer attractive rates and service to consumers, would have a difficult time competing in a BPP environment. Small OSPs with low rates or high quality service, however, should be able to attract customers under BPP. Like small IXCs in the 800 service marketplace, those OSPs can concentrate their initial marketing efforts on business customers and they can offer nationwide originating capability by using a secondary carrier. We also recognize that if large numbers of consumers choose their 1+ carriers as their OSP, those OSPs that did not offer 1+ service would be at a disadvantage. However, if consumers prefer to use their 1+ carrier for operator services, we do not believe that we should deny them that option.

33. CPPs maintain that BPP would have an adverse effect on payphone competition. They argue, first, that without 0+ commissions, they would be unable to compete with LEC payphones.[52] If we adopt BPP, however, we will revise our payphone compensation rules to increase the compensation of CPPs.[53] CPPs also argue that BPP would stifle the introduction of new and innovative payphone services[54] and diminish the availability of payphones.7 [55] BPP would not, however, preclude CPPs from offering new technologies, such as voice messaging services,[56] although it would require that CPPs instruct callers to bypass BPP -- *e.g.*, by pressing the # key -- in order to use such services. Moreover, we do not find convincing evidence that the loss of premises owners' commissions under BPP would adversely affect the availability of public payphone service.[57]

34. AT&T also argues that BPP would force OSPs to subcontract all operator functions to the LECs so that callers would not have to interface with two operator systems.[58] It argues that BPP would thereby result in LEC monopolization of operator services. This argument, however, is based on the faulty premise that callers would object to interfacing with two operator systems. In fact, in most cases, callers would not even know that they were doing so, since most calls would be handled on an automated basis and information provided to the LEC would be passed on to the OSP.

35. MFS asserts that BPP would create a LEC bottleneck through which all 0+ interLATA calls would have to be routed, thereby impeding competitive access providers (CAPs) from competing for this traffic.[59] The record concerning the impact of BPP upon competition in the local services market is particularly thin. For this reason we seek comment on the effect BPP might have on the development of competition in the local exchange marketplace.

C. Weighing the Costs and Benefits

36. In summary, BPP would simplify operator service calling by eliminating access codes and blocked calls, thereby facilitating customer access to the telephone network. It would also save consumers approximately $620 million per year on interLATA 0+ calls by eliminating the highest OSP rates and commissions that inflate OSP cost structures.[60] Even if some revenues from lost commissions are recovered by premises owners through charges for other non-telecommunications services, BPP would benefit the public by generating lower rates and more efficient pricing

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[51] *See*, Ameritech Comments at 14-16; Bell Atlantic Comments at 8; GTE Reply Comments at 4; MCI Reply Comments at 17; Midwest Regulators Comments at 9-10; Missouri PSC Comments at 5; Pacific Comments at 6, 11, Reply Comments at 4-5; Pennsylvania PUC Comments at 5; SNET Comments at 5, 7; SW Bell Comments at 13-15; Sprint Comments at 22-26; USTA Comments at 7.

[52] *See, e.g.*, APCC Comments at 28-32; Arizona DOC Comments at 5; Cleartel, et al, Comments at 22-23; CompTel Reply Comments at 25-26; Intellicall Comments at 19; LinkUSA Comments at 10; Northwest Payphone Comments at 6.

[53] While we have assumed for purposes of analyzing the costs and benefits of BPP, that CPP compensation would double under BPP, see note PAYCOMP25, *supra*, we do not now prescribe changes to our current payphone compensation rules. In the Payphone Compensation proceeding, we have emphasized our preference for a per-call compensation rate in lieu of the per-phone rate that we adopted on an interim basis. *See* Policy and Rules Concerning Operator Service Access and Pay Telephone Compensation, Second Report and Order, CC Docket No. 91-35, 7 FCC Rcd 3251 (1992), *aff'd in part and modified in part*, 8 FCC Rcd 7151 (1993) (*Payphone Compensation Order*). We believe that the industry will be able to implement a per-call compensation system before the availability of BPP. Given this possibility and in light of the long implementation period for BPP, *see* para. DATE9783, *infra*, we will defer consideration of revised payphone compensation rules to a later date.

[54] *See, e.g.*, Airport ACI Comments at 8-10; Hotel & Motel Comments at 6-9; APCC Comments at 5-8; ATC/LDDS Reply Comments at 3; Central Payphone Reply Comments at 3-4; Cleartel, et at, Comments at 23-25; CompTel Comments at 18-19, 23-24; ComTel Comments at 3-4, 6-8; Dallas Airport Comments at 2; Orlando Aviation Comments at 4, 13; NY Payphone Comments at 13; Intellicall Comments at 3, 6-9 & exhibit 2; MFS Reply Comments at 1; Operator Service Comments at 3; PCA Comments at 4; Sharenet Comments at 3; US Long Distance Comments at 15-16.

[55] *See, e.g.*, ACTI Comments at 1; APCC *ex parte* filing, July 19, 1993; California Payphone Comments at 2-3; Dallas Airport Comments at 2; Elcotel Comments at 3; Orlando Aviation Comments at 4-5, 10-12; Illinois CMS Comments at 3; NY Payphone Comments at 3-4; Intellicall Comments at 19; Midwest Payphone Comments at 2-3; Convenience Stores Comments at 13-14; Northwest Payphone Comments at 6-7; NYC Comments at 10-11; NYNEX Comments at 15-16; Opticom Comments at 14-15, Reply Comments at 14-16; Operator Service Comments at 4; Phonetel Comments at 21-22; RCI Long Distance Comments at 7; US Long Distance Comments at 16-17.

[56] *See, e.g.*, MCI Reply Comments at 15-16; Sprint Reply Comments at 10-11.

[57] According to US West, the significant increase in commissions available to payphone providers and premises owners in recent years has not had a meaningful effect on the number of payphones in service. US West *ex parte* filing, Aug. 16, 1993.

[58] AT&T *ex parte* filing, July 15, 1993.

[59] MFS Reply Comments at 3-4; Assoc. for Local Telecommunications Services (ALTS) *ex parte* filing, Jan 10, 1994.

[60] As discussed above, we recognize that this amount would be reduced somewhat if premises owners sought to replace lost commissions with direct surcharges or other price increases.

of operator services. In addition, it would refocus operator service competition on consumers, thereby lessening the need for the Commission to police OSP rates and practices. Finally, it would eliminate certain competitive advantages that AT&T now enjoys in the operator services market. On the other hand, LECs estimate that BPP would likely cost about $420 million per year. In addition, if LECs or OSPs failed to deploy OSS7 as necessary, it could degrade service quality. It could also cause some dislocation in the OSP or payphone marketplaces.

37. Weighing all these factors, it appears from the available information that the significant benefits of BPP outweigh its costs. If implemented, BPP would facilitate network access and increase competition, which would stimulate network usage and thus economic growth. In addition, BPP could represent a valuable improvement to the communications infrastructure. We also believe that if the benefits of BPP are to be fully realized, BPP must be implemented on a nationwide basis. Absent nationwide availability, BPP could increase rather than decrease consumer confusion about operator service dialing rules. Nevertheless, we recognize that cost estimates for technologies that have not yet been fully developed are inherently inexact, as are predictions about future consumer behavior. Moreover, the record does not fully reflect the potential impact that BPP could have on competition in the local exchange. For these reasons, we believe it would be useful to offer parties the opportunity to evaluate and critique our cost/benefit analysis before we make a final decision on BPP. We therefore seek comment on our tentative conclusions and analysis.

38. We also invite parties opposing BPP to describe with specificity alternatives for achieving some or all of the benefits that BPP would provide. For example, we invite parties to suggest alternatives for making operator service calling less confusing and more user friendly. We also seek comment on alternative means for subjecting operator service prices to more effective competition. In addition, we invite comment on whether, in the event we do not adopt BPP, we should reconsider our decision in Phase I of this docket.[61]

IV. IMPLEMENTATION OF BPP

A. The Breadth of Coverage

1. Background/Comments of the Parties

39. In the *Notice*, we tentatively concluded that, if mandated, BPP should apply to all 0+ interLATA calls. We observed that the principal benefit of BPP -- simplified "dialing" -- would only result if BPP applied uniformly to all locations and all types of phones. We sought comment on this tentative conclusion and on whether BPP should also apply to 0- calls. We also invited comment on whether BPP could apply to calls originating in non-equal access offices.

40. Almost all commenters, including those opposed to BPP, argue that if BPP is implemented, it should apply to 0- as well as 0+ interLATA traffic, including calls originating from residential phones and in non-equal access areas.[62] They assert that ubiquitous coverage is the best way to minimize consumer confusion and to reduce per call costs, since full coverage increases call volume, but does not significantly raise the cost of BPP. Nine state regulators and NARUC support the application of BPP to all interLATA calls, but the New York DPS opposes FCC imposition of BPP on intrastate interLATA calls.[63]

41. Two groups request special exemptions: those responsible for prison phone service and smaller rural independent LECs. Smaller rural independent LECs argue that they should not be required to implement BPP.[64] Elkhart asserts that BPP would be even more costly than equal access and that the Commission should allow independents similar flexibility in planning their participation in BPP. Opticom questions whether small LECs with limited finances would be able to afford BPP, while OPASTCO cautions that even where they can, lower call volumes could lead to substantially higher than average per call costs. Elkhart also expresses concern that imposing BPP on smaller LECs would make them more dependent on larger LECs.

42. Dozens of prisons and sheriff's offices and the OSPs and CPPs serving them, as well as the Florida PSC and Midwest Regulators, argue that BPP should not apply to calls from correctional institutions.[65] They assert that BPP would impede the ability of correctional facilities to pre-

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[61] *See* note 7 *supra*.

[62] AT&T *ex parte* filing, July 15, 1993; Ameritech Comments at 7-8; Bell Atlantic Comments at 3; BellSouth Comments at 17-18; Citizens Reply Comments at 2; Florida PSC Comments at 6; GTE Comments at 4-6; Midwest Regulators Comments at 11-13; MCI Comments at 6-7; Michigan PSC Comments at 5; Missouri PSC Comments at 4; NYNEX Comments at 21; SNET Comments at 8-9; SW Bell Comments at 17-18; Sprint Comments at 29; Texas PUC Comments at 7-8; USTA Comments at 7; US West Comments at 17-18. A few OSPs and aggregators assume that BPP could not apply in non-equal access offices; however, the BOCs, GTE, USTA, and others state that this assumption is incorrect. Indeed, US West and USTA assert that "little or no expense" would be required to implement BPP in non-equal access offices. Messagephone argues that BPP should be limited to calls originating from public phones, since BPP is primarily intended to address the problems associated with such calls. Messagephone Reply Comments at 14-15. No other party takes this view. Moreover, LECs assert that limiting BPP to public phone traffic would not significantly reduce overall BPP costs.

[63] Some parties explicitly ask that BPP be implemented for intraLATA calls. Allnet Comments at 4; AmEx Reply Comments at 15-17; AT&T *ex parte* filing, July 15, 1993 (if BPP is mandated); Phonetel Comments at 4. Furthermore, many of the commenters listed in note ALL62, *supra*, support the application of BPP to the widest body of calls, which might well include intraLATA calls. Four Midwest state regulators argue that the issue of whether to impose BPP on intrastate intraLATA calls is one for state regulators -- not the FCC -- to act on. Midwest Regulators Comments at 12-13.

[64] Alltel Reply Comments at 2; Elkhart Reply Comments at 5-7; NTCA Reply Comments at 4-5; OPASTCO Comments at 4; Opticom Reply Comments at 17.

[65] *See, e.g.*, Arizona DOC; CompTel Reply Comments at 28-29; Florida PSC at 6; Inmate Calling Service Comments; Maryland DOC Comments; Midwest Regulators at 11-13; S. Carolina Jailers Comments; S. Carolina Sheriff's Assoc. Comments; Utah DOC Comments; Wisconsin DOC Comments. We also received numerous *ex parte* filings from prison officials.

vent fraud, harassing phone calls, or other criminal or abusive use of prison phones. They note that the Commission has previously recognized the special fraud concerns relating to inmate traffic by exempting prison phones from the TOCSIA unblocking rules, and they argue that the Commission should likewise exempt them from BPP if it is adopted.[66]

43. OSPs and CPPs serving prisons argue that the most efficient way to combat fraud is for a single OSP to be given responsibility for all interLATA calls from a prison, as occurs now under presubscription. They argue that because the OSP serving the prison bears the risk of fraud on calls made from the prison, that OSP has the incentive to install the necessary equipment and take the necessary measures to prevent fraud.[67] They argue that it is far more efficient for a single OSP to assume these responsibilities than to route calls to multiple OSPs, as would be the case under BPP, and leave it to each of them to address fraud in their own systems. Prisons also maintain that by eliminating 0+ commissions, BPP would deny them the revenues they currently use to finance prison expenses, and that without 0+ commission revenues, they could be forced to limit inmate calling.

44. Groups representing the families and friends of inmates oppose an exemption for prison calls.[68] They argue that it would be unfair to deny them the benefits of BPP if those benefits are made available to all other consumers. In response, some OSPs and CPPs serving prisons suggest that the concerns of these groups might be addressed adequately if the Commission set rate ceilings for inmate calling services. They argue that this would be a more cost-effective solution than BPP.[69]

45. MCI disputes claims that fraud control would be inefficient in a BPP environment. It argues that calls originating from prisons account for only a small minority of fraud and that the widespread prevalence of fraud from other sources already forces all OSPs to maintain extensive fraud control systems.[70] MCI and Sprint argue that BPP would actually improve the detection of fraud because all collect calls to a number would be carried by the same carrier rather than the different carriers that now serve different prisons. They assert that BPP could further improve fraud detection on all collect and third number calls, including those from correctional institutions, if LECs incorporated certain fraud protection systems into LIDB. MCI and Sprint note that under BPP, all collect and third number calls billed to a particular line number would be routed to the LIDB containing that line number. Thus, they state, the LEC administering the LIDB would be uniquely situated to identify and prevent fraud calls to that number. They note, for example, that LIDB could be programmed to monitor the volume of collect or third party calls billed to each number and to indicate when such volumes were suspiciously high. If LIDB provided this function, scam phone subscribers and others would not be able to avoid detection by frequently changing OSPs.[71]

46. BOCs supporting BPP state that current LEC technologies, including "flex-ANI," are sufficient to prevent BPP from increasing the prevalence of fraud.[72] Bell Atlantic and Pacific also assert that collect calls from prisons represent approximately half of all collect calls,[73] and that diminishing the volume of BPP calls would raise the per-unit BPP costs for other customers.

2. Discussion

47. We now tentatively conclude that if we mandate BPP, it should generally apply to all interLATA 0+ and 0- calls. A primary goal of BPP is to enable consumers to reach their preferred carriers easily and with minimal confusion. We believe that uniform nationwide 0+ and 0- calling rules are most consistent with this goal. In addition, insofar as it is preferable that calls be routed to the carriers chosen by the billed party (as opposed to the caller), applying BPP to all 0+ and 0- calls could further the public interest.

48. We recognize that there is less need for BPP on 0- calls and on calls from residential and business phones. 0- callers can rely on live operators to transfer their call to their preferred OSP or to instruct them on how to reach that OSP. Callers from residential and business phones are less likely to reach OSPs that charge rates that are higher than the norm. For these reasons, if limiting BPP to 0+ calls or to public phone traffic would significantly reduce the cost of BPP, that option might be attractive. The record indicates, however, that this would not be the case. Indeed, even many of the opponents of BPP support applying BPP to all 0+ and 0- calls if we mandate it.[74]

49. We also tentatively conclude that if we mandate BPP, it would have to be available in independent LEC territories, as well as those of the BOCs. Otherwise, different dialing rules for different locations would confuse callers, and undermine the benefits of simplified operator service calling. We do not believe that it would be unreasonably burdensome for independent LECs to participate in BPP. As is the case with another service we have recently mandated, 800 data base service, independent LECs could arrange to participate in BPP in several ways. Independent LECs that do not currently provide their own operator services could, for example, send their 0+ and 0- traffic to another LEC for screening. Alternatively, independent LECs could use their own OSS and another LEC's LIDB. Or they could share facilities with other small independent

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[66] Gateway Reply Comments at 5-6; Midwest Regulators Comments at 11-12; S. Carolina Jailers Comments at 2-3.

[67] This would include, for example, training operators to handle the tactics inmates might use to commit fraud.

[68] *See, e.g.*, Citizens United for Rehabilitation of Errants (CURE) *ex parte* filing, May 6, 1993; Pennsylvania Prison Society *ex parte* filing, June 9, 1993.

[69] Inmate Calling Service *ex parte* filing, Jan. 5, 1994.

[70] MCI *ex parte* filing, Nov. 24, 1993.

[71] *Id.*; Sprint *ex parte* filing, Dec. 17, 1993.

[72] Ameritech Reply Comments at 15. OSPs purchasing flex-ANI would receive an ANI II code of 29 accompanying all calls from prisons located in exchanges where flex-ANI was available.

[73] Bell Atlantic *ex parte* filing, Aug. 17, 1993 (57% of all intraLATA collect calls handled by Bell Atlantic originate from inmate facilities); Pacific *ex parte* filing, July 6, 1993 (inmate collect calls represent 40% of all collect calls handled through Pacific's network).

[74] We do not now address whether we could or should require BPP for intraLATA calling. We note, however, that many states support the implementation of BPP and we anticipate that states that have authorized intraLATA competition would seriously consider adopting BPP for such calls. As noted, we believe that a truly universal BPP system with uniform nationwide dialing requirements would be in the public interest.

LECs.[75] Given these options, and based on data submitted by USTA, we tentatively conclude that independent LECs would be able to participate in BPP without incurring unreasonable costs.[76]

50. We seek further information and comment on the options available to independent LECs for participating in BPP and on the costs of such options. We also invite parties to suggest rules that should govern LEC participation in BPP. We tentatively conclude that all OSSs used for BPP should be equipped with OSS7 as necessary to provide OSPs with billing information received from callers so that callers do not have to repeat that information to the OSP. We seek comment on this and on any other rules that should govern in this area.

51. We find the current record inadequate for us to make a reasoned decision on whether to exempt inmate telephones from BPP. We seek additional comment on this matter, particularly with respect to the effectiveness and costs of controlling fraud originating on inmate lines with or without BPP. We also seek comment on whether LECs providing LIDB queries should be required to tariff some form of anti-fraud service, *e.g.*, one that would signal OSPs if a suspicious number of collect or third number calls were directed to a particular phone number. Finally, we seek comment on the suggestion offered by some OSPs and CPPs serving prison facilities that prisons be exempted from BPP if they subscribe to an OSP that charges rates below that of the dominant carrier for inter and intraLATA calls.

B. Recovery of BPP Costs

1. Background/Comments of the Parties

52. In the *Notice*, we stated that BPP would appear to qualify as a "new" service under price caps. Pacific, SW Bell, and Sprint support that position.[77] ATC/LDDS and APCC oppose it, arguing that treating BPP as a new service would permit LECs to recover a windfall.[78] They argue that the new service test does not provide an effective upper limit on the price of new services. Bell Atlantic, NYNEX, and SNET also oppose treating BPP as a new service, but their opposition seems to be based on the cost recovery constraint formerly -- but no longer -- imposed by the net revenue test.[79] Ameritech and Bell Atlantic support treating BPP costs as a mandatory expenditure that justifies exogenous cost treatment. Sprint would also favor this approach if BPP costs could not otherwise be spread over all access code calls.[80] NYNEX opposes exogenous treatment because of its concern that higher access prices would hurt its competitive position with respect to CAPs, but Bell Atlantic states that this would not be a problem if CAPs are required to participate in BPP.[81]

53. On the issue of who should pay the costs of BPP, OSP and aggregator opponents of BPP strongly urge that costs be recovered solely from those OSPs receiving BPP calls. AT&T asserts that charging access code users for BPP would violate the principle of attributing costs to the cost causers. The Michigan PSC, however, asks that LECs bill OSPs for BPP on a flat rate, quarterly basis.[82]

54. Bell Atlantic, BellSouth, NYNEX, and US West, as well as Centel, GTE, and SNET, express concern that if LECs must recover BPP costs solely from BPP calls, then some IXCs may encourage their customers to use access codes to avoid BPP charges. They argue that, in that event, the per-call costs of BPP could increase, which could further increase dial-around calling, ultimately precluding LECs from recovering their full costs. MCI and a few aggregators acknowledge this concern, but Elkhart notes that if callers dial around 0+ to avoid paying the cost of BPP then this would indicate that consumers do not value the benefits of BPP more than its costs. SW Bell states its confidence that consumers would be willing to pay more for the convenience of 0+ calling.[83]

55. NYNEX proposes recovering BPP costs from end user common line charges, while LinkUSA supports a partial recovery of BPP costs in that manner. On the other hand, the New York DPS, Michigan PSC, Bell Atlantic and Elkhart oppose this option. Bell Atlantic and Elkhart state that raising all end user costs would burden those not using BPP and undermine efforts to achieve universal service.[84] MCI supports recovering BPP costs in a bifurcated manner based on the equal access cost recovery model. MCI would favor recovering non-recurring costs as exogenous costs from all access users over a set period of years and recovering recurring costs from calls subject to BPP on a per call basis.[85]

56. Ameritech asks that pricing issues not be resolved definitively until tariffs are filed, and Mastercard/VISA asks only that rates be cost justified. US West and Citizens ask for a supplemental notice on cost issues. US West and the Missouri PSC suggest that BPP should be referred to a Joint Board, given that jurisdictional separations will allocate a large portion of BPP costs to the intrastate jurisdiction. Sprint also suggests that separations rules must be

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[75] As with 800 data base service, we would provide independent LECs with as much flexibility as reasonably possible to ensure that they could plan their BPP participation in accordance with their resources and network needs.

[76] USTA *ex parte* filing, July 20, 1993.

[77] *Notice*, 7 FCC Rcd at 3031 n.30; Pacific Reply Comments at 11; SW Bell Comments at 12; Sprint Comments at 21.

[78] APCC Comments at 26; ATC/LDDS Comments at 8.

[79] Bell Atlantic Comments at 5; NYNEX Comments at 16-17; SNET Comments at 5.

[80] Ameritech Comments at 21; Bell Atlantic Comments at 5-6; Sprint Reply Comments at 20.

[81] Bell Atlantic Reply Comments at 2; NYNEX Comments at 18.

[82] *See, e.g.*, Allnet Comments at 2; AT&T *ex parte* filing July 15, 1993; AMNEX Comments at 18; Michigan PSC Comments at 4; Midwest California Payphone Comments at 5-6; NTCA Reply Comments at 5-6.

[83] Hotel & Motel Reply Comments at 2; Bell Atlantic Comments at 6-7; BellSouth Comments at 12-13; California Payphone Reply Comments at 8; Centel Reply Comments at 5; Elkhart Reply Comments at 9; GTE Comments at 12-14; MCI Reply Comments at 11; NYNEX Comments at 18; SNET Comments at 8; SW Bell Reply Comments at 3; US West Comments at 20.

[84] Bell Atlantic Reply Comments at 2-3; Elkhart Reply Comments at 9; LinkUSA Comments at 8, Reply Comments at 27; Michigan PSC Comments at 4; NYNEX Comments at 19, Reply Comments at 6; New York DPS Reply Comments at 2.

[85] MCI Reply Comments at 10-13.

addressed. Bell Atlantic asserts that the Commission must modify parts 32, 36, and 69 of the rules to permit the new rate elements that will be needed for BPP.[86]

2. Discussion

57. We continue to believe that BPP should be treated as a new service for the purposes of price caps. Few parties oppose this conclusion, and most of those opposed in their comments base that opposition on the existence of the new service net revenue test, which has since been eliminated. We believe that BPP fits the definition of a new service because it would "add to the range of options already available to customers" by permitting OSPs to receive a new set of calls: 0+ calls from phones that are not presubscribed to them.[87] At the same time, it would enable them to continue receiving 0+ calls from their presubscribed lines, as well as access code calls from any line.

58. A more difficult call is whether the costs of BPP should be recovered only from BPP calls or all operator services calls. Our policy generally is to attribute costs to cost causers. Moreover, we believe that consumers would value the convenience of 0+ dialing and that many would pay a few cents more per call to enjoy it. On the other hand, OSPs could seek to discourage callers from using BPP, thereby driving down BPP usage and increasing per call costs.[88] Moreover, allowing recovery of BPP costs only from services subject to BPP would ignore that BPP would also reduce OSP costs on many access code calls. Specifically, it would save OSPs the commission they currently pay on 10XXX calls placed from public phones presubscribed to them. OSPs pay commissions on such traffic because they currently cannot distinguish between 10XXX and 0+ calls. Under BPP, the virtual elimination of commissions would cut the cost of handling these calls. Arguably, therefore, it would be inappropriate to load all of the costs of BPP onto 0+ calls.

59. Given these conflicting considerations, we offer no tentative conclusion at this time on how BPP costs should be recovered. We seek further comment on this issue. Specifically, we seek comment on whether BPP costs should be recovered from only BPP calls, BPP and 10XXX calls, or all operator service calls.

60. With respect to our separations rules, we are not persuaded that separations changes are necessary. Given the position of NARUC and commenting states in this proceeding, we have every confidence that if we affirm our tentative conclusions in this proceeding, BPP will be implemented for both interstate and intrastate interLATA traffic and, in many cases, intraLATA traffic as well. That being the case, the record does not lead us to believe that existing usage factors would not yield a reasonable allocation of costs between the jurisdictions for cost categories affected by BPP. Therefore, we find no need for a joint board to reexamine current separations rules.

C. Selecting 0+ Carriers

1. Background

61. The NPRM also asked for comment on what procedures LECs should use to notify subscribers of BPP and of their right to choose a 0+ carrier. The Commission suggested that LECs might either ballot their subscribers or simply notify them of their right to choose a 0+ carrier and of how to do so. The Commission also suggested that customers who did not respond should be defaulted to their 1+ carrier.

2. Comments of the Parties

62. LECs, MCI, Sprint, Midwest Regulators, and the Missouri PSC argue that balloting similar to equal access balloting would be unnecessarily burdensome and costly, with LEC cost estimates totaling as much as $150 million.[89] BellSouth suggests that balloting costs could be reduced by limiting balloting to LEC calling card customers.[90] Other LECs assert that LECs should only be required to insert a notification informing each subscriber of its right to choose a 0+ carrier or to default to its 1+ carrier. LEC cost estimates for this type of customer notification are far lower than estimates for an equal access-type balloting procedure.[91]

63. Third-tier OSPs and the Michigan PSC oppose defaulting customers to their 1+ carrier.[92] Third-tier OSPs claim that they would be unable to compete if customers were defaulted to their 1+ carrier. Capital Network pre-

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[86] Ameritech Reply Comments at 13; Bell Atlantic Reply Comments at 3; Citizens Reply Comments at 1; Mastercard/Visa Comments at 20; Missouri PSC Comments at 8; Northwest Payphone Reply Comments at 5; Sprint Reply Comments at 21; US West Reply Comments at 3-4.

[87] "As long as the pre-existing service is still offered, and the range of alternatives available to consumers is increased, we will classify the service as new." Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, CC Docket No. 87-313, 5 FCC Rcd 6786, 6824 para. 314 (1990) and Erratum, 5 FCC Rcd 7664 (1990) (LEC Price Cap Order), modified on recon. 6 FCC Rcd 2637 (1991), further modified 6 FCC Rcd 4524 (1991), further modified 7 FCC Rcd 811 (1992), aff'd Nat'l Rural Telecomm. Ass'n. v. FCC, 988 F.2d 174 (D.C. Cir. 1993).

[88] Even if, under BPP, 0+ calls cost OSPs an additional $.15 per call in BPP charges, it is not clear that OSPs would encourage customers to make access code calls by setting their rates to reflect that cost differential. MCI and Sprint currently charge almost the same rates to customers who make 0+ calls from payphones presubscribed to MCI and Sprint as to customers who use 1-800 access codes from those phones, even though the carriers must pay commissions of approximately $.35 per call to receive the former calls and nothing to receive the latter.

[89] Ameritech Comments at 17; BellSouth Comments at Exhibit 1; GTE Comments at 6; MCI Reply Comments at 24; Midwest Regulators Comments at 14; NYNEX Comments at 20 and Attachment B; Missouri PSC Comments at 7; Pacific Comments at 14; Rock Hill Reply Comments at 4; SNET Comments at 9; SW Bell Comments at 20-21; Sprint Comments at 32-33; USTA Comments at 8; US West Comments at 18 and Appendix.

[90] *See, e.g.*, Ameritech Comments at 17 (several fold increase over $13.1 million); BellSouth Comments at Exhibit 1 ($5.2 million for balloting cardholders); NYNEX Comments at Attachment B ($19.3 million).

[91] *See, e.g.*, NYNEX Comments at Attachment B ($2.1 million v. $19.3 million for balloting); US West Comments at Appendix ($1.1 million identified for "balloting").

[92] AMNEX Comments at 21-22; APCC Reply Comments at 10; Chillicothe Reply Comments at 11-15; Cleartel, et al Reply Comments at 16-17; Capital Network Comments at 18-19; CompTel Comments at 27-29; Intellicall Comments at 24-25; LinkUSA Comments at 11-12; Litel Comments at 5; Michigan PSC Comments at 6.

dicts that 60% of customers would not take any steps to identify their preferred 0+ carrier. Third-tier OSPs generally favor the equal access approach of allocating default customers in the same proportion as customers who affirmatively chose an OSP.

64. Both the Michigan PSC and the Indiana & Pennsylvania Consumer Advocates argue that consumers should also be permitted to select their secondary carrier, and maybe even a separate carrier for international calls. Phonetel states its concern that primary carriers might pick secondary carriers based on commissions offered by the secondary carrier, rather than service quality.[93] All other parties commenting on this question assert that the primary carrier should select its customers' secondary carrier, although commenters disagree on such issues as whether multiple secondary carriers should be allowed, and whether customers should be notified of their secondary carrier and allowed to change it, or whether these are unnecessarily costly options.[94]

3. Discussion

65. We now tentatively conclude that if BPP is implemented, each LEC will be required to notify its subscribers of their right to choose a 0+ carrier and to provide all subscribers with a ballot for doing so. While LECs claim generally that a balloting procedure would be unreasonably expensive, they seem to base that claim on the assumption that a balloting process would be similar to equal access balloting. As discussed in more detail below, we do not believe that these kinds of procedures are necessary or appropriate for BPP.

66. In the event that we require LECs to provide notices and ballots to their customers, we will permit them to do so via either a separate mailing or a prominent billing insert. LECs using a billing insert would not have to provide customers with response envelopes if responses could be included with customers' payments. We will not require LECs to provide further notices and ballots to nonresponding customers. Presumably, OSPs would begin advertising campaigns aimed at winning 0+ business well before the balloting process takes place. Therefore, customers inclined to make a 0+ choice would be educated to look for a ballot in the mail or in their phone bill. Moreover, customers would always be free to change their 0+ carrier after the initial balloting period. We do not believe that these procedures would be unduly burdensome or expensive. Therefore, we see no need to adopt BellSouth's suggestion that balloting requirements be limited to LEC calling card customers.

67. We tentatively conclude that customers who do not respond should be defaulted to their 1+ carrier. While some parties urge an allocation mechanism, such as that used in equal access balloting, we do not believe that those kinds of allocation procedures would be appropriate to BPP balloting. Unlike the situation then, most customers have already selected a preferred long-distance carrier. We believe that we should not ignore this choice in assigning customers a 0+ carrier. We seek comment on our tentative conclusion and on the alternative possibility of allocating customers who do not vote in proportion to the selections of customers who do vote. We would particularly welcome comments from consumers and their representatives on the relative benefits and costs of these alternatives.

68. The record does not contain sufficient information for us to decide whether users should be permitted to choose their own secondary carrier or whether they must be notified of the identity of that carrier. If users would be billed directly by their secondary carrier for traffic that carrier handles, then consumers should ideally be able to choose that carrier. Moreover, if calls carried by the secondary carrier would be branded by that carrier, it might be confusing to callers if they were not at least notified that this secondary carrier would be handling some of their calls. On the other hand, if customers were billed only by their primary carrier and at that carrier's rates, it is not apparent that customers need to be afforded the opportunity to choose their own secondary carrier.[95] Rather, it would seem that the choice of secondary carrier would best be viewed as part of the service offering of the primary carrier. In that situation, competition among primary carriers would likely ensure that they chose secondary carriers that provided quality service and were responsive to customer needs. Moreover, allowing primary carriers to choose their own secondary carrier would enable primary carriers to select secondary carriers that would handle their traffic on the most favorable terms. This would especially help smaller OSPs that lack nationwide originating capabilities. We seek further information and comment on how secondary carrier arrangements should be handled under BPP. We also seek comment on how TOCSIA's call branding requirements should apply in a BPP environment.

69. Smaller OSPs might also benefit if they were permitted to designate different secondary carriers in different geographic areas. This would permit smaller OSPs to use other regional OSPs in lieu of a single nationwide carrier. We believe that would provide for a more competitive secondary carrier market and likely enable smaller OSPs to obtain the services of secondary carriers on more favorable terms. We seek comment on the costs and benefits of allowing an OSP to use different secondary carriers in different geographic areas. Finally, we seek comment on the costs and benefits of allowing customers to designate different OSPs for international and domestic calling.

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[93] Indiana & Pennsylvania Consumers Comments at 15; Michigan PSC Comments at 6; Phonetel Comments at 11.

[94] Ameritech Comments at 9-10 (one secondary carrier per region); BellSouth Comments at 19; GTE Comments at 6-7 (but primary carrier must choose a secondary carrier that serves nationwide); Litel Comments at 6 (maybe multiple secondary carriers); MCI Reply Comments at 19 (only one alternate carrier); Missouri PSC Comments at 6; Pacific Comments at 15; Rock Hill Reply Comments at 4 (customers should be able to select a separate international 0+ carrier); SNET Comments at 9-10 (the one alternate must serve nationwide); SW Bell Comments at 21 (customers may be allowed to change the secondary carrier); Sprint Comments at 34-35 (customers should be notified); US West Comments at 19 (customer should be notified and permitted to change the alternate carrier).

[95] While we have recognized the value of allowing 800 service subscribers to choose multiple carriers for their 800 service needs, many 800 subscribers generate extremely high call volumes, such that designing their own service offers them the opportunity to reap substantial benefits. No one has shown that consumers would seek to manage their operator service traffic in this manner.

D. The Costs & Benefits of 14-Digit Screening in LIDB

1. Background

70. As noted above, LECs state that they would identify the presubscribed OSP for line number cards by screening only the first ten digits of such cards, *i.e.*, the ten-digit telephone line number. The customer's four-digit personal identification number (PIN) would not be considered. Thus, the proposed LEC BPP design only permits one line-number based calling card number per line in LIDB. In the *Notice*, we observed that if LECs performed LIDB screening on 14 digits instead of ten, customers could maintain line number cards issued by multiple carriers, with a different PIN for each card.[96] We sought comment on the feasibility and desirability of fourteen-digit screening.

2. Comments of the Parties

71. LECs argue that permitting multiple line number cards in LIDB would substantially increase BPP costs without offering any significant benefit.[97] Pacific and SW Bell estimate that coordinating the assignment of and maintaining PINs for multiple line number cards would add between three and fifteen million dollars in BPP costs per BOC.[98] They also claim that it would increase the danger of fraud. They argue that customers do not need or want multiple line number cards. Indeed, Ameritech argues that 14-digit screening would be harmful to consumers, because OSPs would likely issue proprietary line number cards that would not permit customers to choose an alternate OSP via access codes, as would a LEC line number card.[99] In response to concerns that ten-digit screening would confer on LECs a monopoly over line number cards, Pacific states that OSPs would have the same opportunity as LECs to issue a line number card in a 10-digit screening environment.[100]

72. OSPs argue that multiple line number cards would maximize customer choice by enabling customers to vary OSPs without sacrificing the advantages of a line number card.[101] They note, for example, that consumers might wish to retain different cards for personal and business usage. In addition, citing market research showing a consumer preference for line number cards, MCI, Sprint, and AMNEX assert that LECs should not be the only carriers that are able to issue such cards.[102] Sprint also claims that if it cannot retain its existing line number cards, it would need to spend about $20 million to issue new cards.[103] Sprint also disputes Ameritech's assumption that OSP line number cards would likely be proprietary and thereby not eligible for use with access code calling.[104]

3. Discussion

73. We do not believe that it would be in the public interest to adopt a BPP design that gives LECs, but not OSPs, the ability to offer line number calling cards. In the *Notice*, we assumed that without fourteen-digit LIDB screening, OSPs would be unable to issue their own line number calling cards. Some LECs, however, now dispute this assumption. They maintain that even if customers were permitted only one line-number based calling card, there is no reason why a LEC would need to have exclusive rights to that card number. They maintain that the customer's chosen OSP could issue its own line number calling card with the same PIN or, upon customer authorization, substitute its own line-number card (with a different PIN) for the LEC card.[105] They maintain, finally, that OSPs could also do their own billing for line number card calls made by their customers (whose billing name and address the OSP would have in their records).

74. We harbor some concerns about the administrative implications of this proposal. Nevertheless, we believe this proposal is worthy of further comment as a possible alternative to fourteen-digit screening. As noted, we will not adopt any BPP design that gives either LECs or OSPs the exclusive ability to issue line number cards. If, however, the costs of fourteen-digit screening are substantial, and our goals can be achieved within the context of ten-digit screening, we would accord serious consideration to this ten-digit alternative. We therefore seek further comment on the relative costs and benefits of fourteen digit screening versus the ten-digit screening solution described above.

E. Commercial and Foreign Credit Cards

1. Background/Comments of the Parties

75. In the *Notice*, we sought comment on how commercial credit cards and foreign-issued calling cards should be handled in a BPP environment.[106]

76. Mastercard/VISA, American Express, Sprint, and the Michigan PSC argue that BPP should be designed in a way that permits callers to use commercial credit cards on BPP calls. They argue that commercial credit cards give customers the opportunity to secure extended credit and offer other advantages, such as liability limitations, that are valued by consumers.[107] Mastercard/ VISA also asserts that the

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[96] 7 FCC Rcd at 3029 n.19.

[97] Ameritech Comments at 12-13, *ex parte* filing, Sept. 3, 1993; Bell Atlantic Comments at 9-10; BellSouth Comments at 7-8; GTE Comments at 8-9; Pacific *ex parte* filing Dec. 3, 1993; SNET Comments at 6-7; SW Bell Reply Comments at 14, *ex parte* filing, Dec. 8, 1993.

[98] Pacific *ex parte* filing, Dec. 3, 1993; SW Bell *ex parte* filing, Dec. 8, 1993.

[99] Ameritech assumes that OSPs would be able to issue proprietary line number cards under BPP, although the Commission could preclude this.

[100] Pacific *ex parte* filing, Dec. 3, 1993.

[101] AT&T *ex parte* filing, July 15, 1993; Sprint Comments at 11-13, *ex partes*, Oct. 5, 1993, Oct. 20, 1993.

[102] AMNEX Comments at 10-11; LinkUSA Comments at 18-19; MCI Comments at 8; Sprint Reply Comments at 27. GTE challenges that assessment, however, stating that AT&T abandoned line number cards with no apparent negative effect. GTE Reply Comments at 5.

[103] Advanced Technologies Comments at 3, citing Sprint Comments in Docket 92-77, Part I, at 10.

[104] Sprint *ex parte* filing, Oct. 20, 1993.

[105] In the latter case, the OSP would have to notify the LIDB administrator to adjust the PIN in LIDB to match the PIN on its card.

[106] 7 FCC Rcd at 3033.

[107] *See, e.g.*, American Express Reply Comments at 3-11; Mastercard/VISA Comments at 13-16, Reply Comments at 5-7; Michigan PSC Comments at 6; Sprint Reply Comments at 28.

popularity of AT&T's universal card and experiences in numerous other retail and service industries confirm that consumers value the ability to make purchases using a single, general purpose credit card. It states that market research indicates that more than forty percent of existing cardholders would likely use their VISA or Mastercard to make 0+ calls if given that option.[108]

77. Mastercard/VISA asserts that BPP could readily accommodate commercial credit cards. It notes that under current plans, LECs would query an OSP data base for routing instructions when presented with a CIID or 891 calling card. It states that LECs could similarly query a commercial credit card data base when presented with a commercial credit card number.[109]

78. Mastercard/VISA and Sprint maintain that LECs should be able to handle commercial credit cards that conform to ISO/ANSI standards.[110] In fact, Mastercard/VISA reports that Northern Telecom has already developed software that would permit use of commercial credit cards under BPP. Mastercard/VISA claims that this software will be released by the end of 1994 and that Ameritech and GTE estimate that it will cost them only about $3 million each to install.[111]

79. Many LECs question the feasibility of incorporating commercial credit cards into BPP and suggest that this issue be addressed at a later date, after initial implementation of BPP is achieved.[112] BellSouth, MCI, and Pacific also question whether the small demand for using commercial and foreign credit cards justifies the costs of accommodating them, although MCI and Pacific state that they would not object to including commercial credit cards in BPP if commercial credit card companies were responsible for maintaining the data bases to which queries would be sent for carrier identification.[113] The Missouri PSC asks that BPP not be delayed or burdened by the need to handle commercial credit cards.[114]

2. Discussion

80. We now tentatively conclude that if BPP is implemented, it should accommodate commercial credit cards that conform to ISO/ANSI standards on the same basis as 891 and CIID calling cards. The record indicates that consumers value commercial credit cards and that some of them would seek to use such cards for billing long-distance calls. No party has presented any compelling reason why consumers should be denied this option, nor has any party shown that it would be unreasonably burdensome for LECs to incorporate it into BPP.

F. Restrictions on Dialing Around BPP

81. Almost all commenters addressing the issue agree with our tentative conclusion that if we adopt BPP, we should amend our rules to prohibit aggregators from programming their phones to dial around BPP, *e.g.*, by translating 0+ calls into access code or 1+ calls.[115] USTA goes further, asking us to prohibit access code dialing altogether, but other parties argue that this would unreasonably deny consumers a potentially valuable option.[116] The APCC and NATA take the opposite position. They assert that prohibiting payphones from being programmed to dial around BPP would be contrary to the Commission's policies promoting competition in CPE, enhanced services, long distance, and local exchange markets.[117] Furthermore, NATA states that even if the Commission does impose a prohibition against dialing around, such a restriction should not be incorporated into Part 68. NATA argues that Part 68 has always been limited to rules directed at ensuring the technical integrity of the network, and that the proposed restriction does not concern a technical matter.

82. We now propose that if we adopt BPP, we will amend our rules to prohibit aggregators from programming their phones to convert consumer 0+ calls into calls that bypass the BPP system. We have emphasized in this Further Notice of Proposed Rulemaking that a principal benefit of BPP -- simplified dialing requirements -- depends upon the ubiquitous availability of this service. If aggregators were permitted to bypass BPP, for example, through the use of a simple automatic dialer, this benefit would be severely curtailed, if not eliminated altogether. While we initially proposed to incorporate restrictions on bypassing BPP in Part 68, we agree with NATA that these provisions would not fit well within Part 68, which addresses issues of technical integrity of the network. We would therefore, instead, amend 47 CFR §64.704(a), which governs call blocking, to prohibit aggregators from preventing calls dialed 0+ from reaching the preferred carrier of the billed party. We also reject USTA's request that we prohibit access code dialing altogether. USTA has not presented any good reason why consumers should be denied the option of dialing around their presubscribed 0+ carrier.

G. Timing

83. If we conclude that BPP is in the public interest, we believe it should be implemented as soon as possible. Most comments indicate that BPP could be implemented one year after the necessary software is available from vendors or within three years of a Commission order mandating it.

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[108] Mastercard/VISA Reply Comments at 5-7; VISA *ex parte* filing, Sept. 9, 1993.

[109] Mastercard/VISA Comments at 8.

[110] The International Organization for Standardization (ISO) develops international standards for information systems. The American National Standards Institute (ANSI) represents the United States in ISO forums.

[111] Ameritech Reply Comments at 7; GTE *ex parte* filing, July 2, 1993; Mastercard/VISA Comments at 19-20; Sprint Reply Comments at 28; VISA *ex parte* filing, Sept. 9, 1993.

[112] Ameritech Comments at 10-11; BellSouth Comments at 18-19; Centel Reply Comments at 7; GTE Comments at 10; Pacific Comments at 16; SW Bell Comments at 21, Reply Comments at 9-10; USTA Comments at 9.

[113] BellSouth Comments at 18-19; MCI Reply Comments at 22; Pacific Comments at 16.

[114] Missouri PSC Comments at 4.

[115] Ameritech Comments at 9; Bell Atlantic Comments at 2; Centel Reply Comments at 3; Citizens Reply Comments at 1; Florida PSC Comments at 5 GTE Comments at 7-8; Litel Comments at 5; Midwest Regulators Comments at 10; Missouri PSC Comments at 6-7; NYNEX Comments at 21-22; Pacific Comments at 12; Rock Hill Reply Comments at 3; SNET Comments at 8; SW Bell Comments at 16; Sprint Comments at 29; Texas PUC Comments at 7; USTA Comments at 8; US West Comments at 16-17.

[116] AT&T Reply Comments at 6; LinkUSA Comments at 6-7; Sharenet Comments at 2; USTA Comments at 8?.

[117] APCC Comments at 5-9; NATA Comments at 2.

We understand, however, that manufacturers have been working on the development of BPP software over the past year and, thus, Pacific estimates that BPP could be operational within two and a half years or less of a Commission mandate.[118] We seek further comment on how soon BPP could be implemented given that we intend to issue a final decision in this proceeding at the earliest possible date.

V. CONCLUSION

84. In this Further Notice of Proposed Rulemaking, we review and analyze the data in the record and find that BPP appears to be in the public interest. We find that BPP would facilitate access to the telephone network by eliminating the need to use access codes on operator service calls. We believe that BPP would stimulate competition in operator services both by eliminating AT&T advantages in the operator services market and by redirecting operator services competition more towards consumers. We also believe that more consumer-oriented competition should result in lower prices and better services, which, coupled with easier access, should stimulate network usage. Moreover, the technology required for BPP would enrich the nation's telecommunications infrastructure, paving the way for future network innovation. Nevertheless, given the estimated cost of BPP and the age of the record on which we base our tentative conclusion that BPP would serve the public interest, we conclude that we should proceed cautiously. Therefore, before issuing a final decision on this matter, we invite comment on our tentative conclusions and the data and analysis underlying them.

VI. PROCEDURAL MATTERS

85. *Ex parte.* This is a non-restricted notice and comment rulemaking. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. *See generally,* 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

86. *Initial Regulatory Flexibility Analysis:* Our initial regulatory flexibility analysis was included in the *Notice,* 7 FCC Rcd at 3034, 57 FR 21038 (1992).

87. *Notice and Comment Provisions.* Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before July 8, 1994, and reply comments on or before July 29, 1994. To file formally in this proceeding, persons must file an original and four copies of all comments and reply comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. In addition, parties should file two copies of any such pleadings with the Policy and Program Planning Division, Common Carrier Bureau, Room 544, 1919 M Street, NW, Washington, D.C.. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, ITS, Inc. 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. For further information regarding this Further Notice of Proposed Rulemaking contact Mark S. Nadel (202) 632-1301, Common Carrier Bureau, Policy and Program Planning Division.

VII. ORDERING CLAUSES

88. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 4, 201-205, 218, and 403 of the Communications Act as amended, 47 U.S.C. §§ 151, 154, 201-205, 220, and 403, a FURTHER NOTICE OF PROPOSED RULEMAKING IS HEREBY PROVIDED as explained herein.

89. IT IS FURTHER ORDERED that, pursuant to Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, comments on this proposal SHALL BE FILED with the Secretary, Federal Communications Commission, Washington, D.C. 20554 on or before July 8, 1994 and reply comments SHALL BE FILED with the Secretary on or before July 29, 1994.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

List of Commenters

Advanced Payphone Systems, Inc.

Advanced Technologies Cellular Telecommunications, Inc. (Advanced Technologies)

Advanced Telecommunications Corp. and LDDS Communications (ATC/LDDS)

Airport Assoc. Council International (Airport ACI)*

Alleghany County Dept of Aviation (Alleghany)

Allnet Communication Services (Allnet)

Alltel Service Corp. (Alltel)**

Alternate Communications Technology, Inc. (ACTI)

American Association of Airport Executives

American Express (AmEx)**

American Hotel & Motel Assoc. (Hotel & Motel)*

American Public Communications Council (APCC)*

American Telemanagement

American Telephone & Telegraph (AT&T)*

Americom

[118] *See, e.g.,* Ameritech Comments at 2; Bell Atlantic Comments at 2; BellSouth Comments at 17; Pacific *ex parte* filing, Jan. 4, 1994; Sprint Comments at 31.

Ameritech*

American Network Exchange & NYCOM Information Services (AMNEX)

Arizona Dept. of Corrections (Arizona DOC)

Bell Atlantic*

BellSouth*

California Payphone Assoc. (California Payphone)*

Capital Network System (Capital Network)*

Central Atlantic Payphone Association (Central Payphone)**

Central Telephone**

Chase Manhattan Bank**

Chillicothe Telephone (Chillicothe)**

Citizens Utilities Company (Citizens)**

Cleartel Communications, COM Systems, International Pacific,

Teltrust Communications Services (Cleartel, et al)*

Columbia (So. Carolina) Metropolitan Airport

Competitive Telecommunications Assoc. (CompTel)*

ComTel Computer Corp. (ComTel)

Consolidated Communications Operator Services, Illinois

Consolidated Telephone, Consolidated Network, and

Consolidated Communications Public Services

Dallas/Fort Worth International Airport Board (Dallas

Airport)

Elcotel

Elkhart Telephone (Elkhart)**

Florida Public Service Commission (Florida PSC)

Gateway Technologies (Gateway)**

Georgia Depart. of Admin. Services

Greater Orlando Aviation Authority (Orlando Aviation)

GTE*

Harvard University (Harvard)

Illinois Commerce Commission, Indiana Utility Regulatory

Commission, Public Utilities Commission of Ohio, and

Public Service Commission of Wisconsin (Midwest Regulators)

Illinois Dept of Central Management Services (Illinois CMS)

Indiana Office of Utility Consumer Counselor & Pennsylvania Office of Consumer Advocate (Indiana & Pennsylvania Consumers)* (Indiana only for reply)

Independent Payphone Assoc. of New York (NY Payphone)

Independent Telecommunications Network

Inmate Calling Service Providers Task Force of the APCC (Inmate Calling Service)*

Intellicall*

Intera Communications Corp.

International Telecharge, Inc. (ITI)*

LinkUSA*

Litel Telecommunications Corp. dba LCI International (Litel)*

Maryland Division of Correction

Mastercard International & VISA USA (Mastercard/VISA)*

MCI Telecommunications Corp. (MCI)*

MessagePhone*

Metropolitan Fiber Systems (MFS)**

Michigan Public Service Commission (Michigan PSC)

Midwest Independent Coin Payphone Assoc. (Midwest Payphone)*

Missouri Public Service Commission (Missouri PSC)

National Assoc. of Convenience Stores (Convenience Stores)

National Telephone Cooperative Assoc. (NTCA)**

New York City Dept. of Telecommunications & Energy (NYC)

New York Depart. of Public Service (New York DPS)**

North American Telecommunications Assoc. (NATA)

New York Telephone & New England Telephone (NYNEX)*

Northwest Pay Phone Assoc. (Northwest Payphone)*

Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO)

One Call Communications dba Opticom (Opticom)*

Operator Service Company (Operator Service) & US Osiris Corp (reply only)*

Pacific Bell & Nevada Bell (Pacific)*

Pennsylvania's Governor

Pennsylvania Public Utility Commission (Pennsylvania PUC)*

Petroleum Marketers Association of America

Phonetel Technologies (PhoneTel)*

Pilgrim Telephone (Pilgrim)

Polar Communications (Polar)

Public Communications Assoc. Ltd (PCA)

RCI Long Distance

Rock Hill Telephone (Rock Hill)**

Sharenet Communications (Sharenet)

South Carolina Division of Information Resource Management (S. Carolina DIRM)

South Carolina Jail Administrators Assoc. (S. Carolina Jailers)

South Carolina Sheriff's Assoc.

Southern New England Telephone (SNET)

The Southland Corp. (Southland)**
Southwestern Bell Telephone (SW Bell)
Sprint*
Tennesse Dept of Finance & Admin Office
Texas General Services Commission (Texas GSC)**
Public Utilities Commission of Texas (Texas PUC)
Travis, TX**
US Intelco Network
US Long Distance*
United States Telephone Assoc. (USTA)*
US West Communications (US West)*
Utah Dept. of Corrections (Utah DOC)
Value Added Communications (VAC)
Airport Authority of Washoe County (Washoe)
Wisconsin Dept. of Corrections (Wisconsin DOC)

* filed comments and reply comments
** only filed reply comments

APPENDIX B

We derive the figure of $340 million for estimated savings on commissions from BPP as follows: *TOCSIA Table 4* estimates 1991 operator service revenues from aggregator phones at $6.1 billion, approximately $1.2 billion of which was third-tier OSP revenue. To estimate 1997 0+ revenues, we make the following adjustments. We first adjust 1991 revenues to account for overall growth in operator service revenues between 1991 and 1997. We assume a 4.3% annual growth rate, *see* note PAYCOMP25, *supra*, and thereby derive a revenue figure of $7.9 billion in 1997, $1.5 billion of which would be third-tier OSP revenues.

We next adjust these numbers to account for our predicted shift in traffic from higher-priced OSPs to lower-priced OSPs between 1991 and 1997. As discussed earlier, we anticipate that the market share of third-tier OSPs will decline by about one third during this period as customers increasingly dial around the highest priced OSPs. Therefore, we assume that one third of anticipated third-tier OSP revenues in 1997 would be priced at the AT&T/MCI/Sprint average rate, rather than higher third-tier rates. Thus, 1/3 X $1.5 billion, or $.5 billion, would be priced at approximately a 36% discount, for a savings of $18 million. Hence, we calculate that actual 1997 operator service revenues will decline by $.18 billion to approximately $7.7 billion.

We then assume that 18.1% of these revenues are from intraLATA calls, *id.*, and that the dial-around rate will increase to 50% by 1997, *see* note PAYCOMP25, *supra*, leaving $3.2 billion in interLATA 0+ revenues. We next calculate from *TOCSIA Table 4* that 1991 0+ commission payments averaged about 12% ($500 million$4.1 billion) of 0+ revenues from aggregator phones. We apply this rate to anticipated 1997 0+ interLATA revenues to arrive at $380 million in estimated commission payments.

We then make two additional adjustments. First, we assume for the purposes of this analysis that we would raise the compensation paid by OSPs to competitive payphone providers (CPPs). In our *Payphone Compensation Order* we noted there that $6 per month per phone was reasonable compensation for the approximately half of the interstate access calls likely to use access codes. Here we estimate that an additional $6 per month per phone would compensate for the loss of commissions on the other half of those calls. This would reduce 0+ commission savings by about $22 million per year (300,000 CPP phones X $6 X 12 months) to about $360 million.

Second, we must subtract commissions that would otherwise be paid on the $280 million in third-tier OSP revenues that we estimated would disappear due to BPP, *see* note GROWRATE24, *supra*. This would reduce 0+ commission savings by an additional $17 ($280 million X 50% non-dial-around X 12% commission rate) to about $340 million.

APPENDIX C: LEC BPP COST SUMMARY

LEC	TOTAL COSTS: Non-Recurring	Recurring	OPERATOR COSTS (gross)[1] Non-recurring: AABS +Operator Facilities	Recurring: Operator Salaries
Ameritech	48.8	14.1		14.1
Bell Atlantic	125.5	8.6	26.3	6.3
BellSouth	145.6	6.8	27.2	6.5
GTE	112.4	25.4	18.5	11.3
NYNEX[2]	129.4	13.7	3.1	13.7
Pacific	144.4	26.1	41.8	21.8
SW Bell	160.9	9.0	3.9	9.0
US West	149.9	27.8	25.3	23.6
USTA[3] (for independents)	197.8	17.5	32.6	17.5
TOTAL	1215.7	149.0	178.7	123.8

Note: These figures are LEC cost estimates in millions of dollars. With only one exception (see note 2, below) we do not decide whether these costs are reasonable or fully attributable to BPP.

Sources: Ameritech *ex parte*, July 8, 1993; Bell Atlantic *ex partes*, May 28, 1993, Oct. 19, 1993; BellSouth comments at exhibit 1; GTE *ex parte*, Aug. 24, 1993; NYNEX comments at attachments A&B; *ex partes*, Aug. 4, 1993, Apr. 28, 1994; Pacific *ex parte*, July 6, 1993; SW Bell *ex parte*, Jun. 3, 1993; US West *ex parte*, Aug. 16, 1993; USTA *ex parte*, July 20, 1993.

[1]A large portion of these costs would likely be offset by reductions in operators costs for OSPs since the operator services that would be provided by the LECs are now provided by OSPs.

[2]This excludes certain NYNEX estimated costs noted in NYNEX *ex parte* filings, Aug. 4, 1993 and Apr. 28, 1994, which appear to be facially invalid.

[3]For independents other than GTE.

Separate Statement
of
Commissioner James H. Quello

Re: Billed Party Preference 0+ InterLATA Calls,
CC Docket No. 92-77

The Commission is acting prudently by issuing a Further Notice of Proposed Rulemaking in this proceeding regarding Billed Party Preference (BPP). I agree that a further notice of proposed rulemaking is needed principally because of the state of the record. I do not believe that the record is sufficiently complete, accurate, or current for the Commission to make a finding that BPP is in the public interest.

In particular, my concerns about the state of the record cause me to question the reliability of the cost data and the potential impact on the network. Even the most conservative financial data estimate that BPP will cost over one billion dollars to implement and millions more annually to maintain. It is unclear what effect this massive expenditure would have on the on-going deployment of the "intelligent network". Because the record does not suggest other uses for the BPP software, I am concerned that other more useful network upgrades could be delayed or not developed and deployed at all if we mandate BPP.

Before we mandate BPP, we must determine the extent of the "problem" that it is supposed to fix and whether there are less costly alternatives. Several parties have suggested that the TOCSIA framework of mandated unblocking, call branding, and signage, is working to address consumer complaints. Indeed, the FCC said so in our 1992 report to Congress. Additionally, the growth of dial-around services suggests that consumers are aware of and able to reach their carrier of choice. The record, however, is generally bereft of current information on user demand for and alternatives to BPP. In light of these factors, the Commission needs new evidence to assure itself that BPP is not an idea whose time has come -- and gone.

Although this proposal for BPP has been around since 1988, the record consists heavily of ex parte statements that reflect deep division and changing alliances among the affected parties. Indeed, the original proponent of BPP, Bell Atlantic, now strongly opposes it. Because BPP would result in a costly network reconfiguration that would affect every provider and increase the cost of every interLATA call, the Commission must base its decision on the most current hard data available.

Accordingly, I do not believe that we can make a public interest finding regarding Billed Party Preference at this time and on this record. So that we may receive more useful data, I support the issuance of this Further Notice of Proposed Rulemaking.

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: Billed Party Preference for 0+ InterLATA Calls, Further Notice of Proposed Rulemaking (CC Docket No. 92-77)

In this Further Notice of Proposed Rulemaking, the Commission states as a tentative conclusion that review of the evidence in the record and other publicly available data indicates that billed party preference, if implemented within certain parameters, would serve the public interest. Due to the technology required for billed party preference, as well as the range of the cost data submitted over a broad period of time in this proceeding, we have determined before issuing a final decision to invite parties to comment on our analysis of the benefits and costs of billed party preference. In doing so, the Commission should mandate billed party preference if, as indicated in the current record, its benefits outweigh the costs of implementing the technology, and that these benefits cannot be achieved through alternative, less costly measures.

Based on the existing record in this proceeding, I write separately to emphasize my support for the conclusions in the Further Notice, especially to the extent that billed party preference could focus competition for operator services on consumers, thereby fostering lower rates and improved services for consumers. I believe, however that the record should be updated on the relative costs and benefits of moving forward to implement the technology. I am particularly interested in public comment to provide updated cost data that will enable the Commission to determine whether the potential benefits require the significant -- and widely varying -- estimated expenses identified in this proceeding's record. Accordingly, I also am interested in comment regarding the types of benefits to the marketplace and consumers that are likely to occur as a result of implementing billed party preference.

In addition, the Further Notice states that the Commission intends to proceed expeditiously with the review of the record. Given that this proceeding has been before us for a considerable period of time, I look forward to working with my colleagues and Commission staff to make a final determination regarding billed party preference at the earliest possible date.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CELLNET COMMUNICATIONS, INC.,
Complainant,

v. File No. E-91-95

DETROIT SMSA LIMITED PARTNERSHIP,
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: July 8, 1994; Released: July 8, 1994

By the Deputy Chief (Policy), Common Carrier Bureau

I. INTRODUCTION

1. Cellnet Communications, Inc. (Cellnet or complainant),[1] has filed the above-captioned formal complaint against Detroit SMSA Limited Partnership (Detroit SMSA or defendant).[2] Cellnet seeks resolution of three issues referred to the Commission under the doctrine of primary jurisdiction, by the United States District Court for the Eastern District of Michigan, Southern Division.[3]

2. The issues referred by the court arise out of a dispute between Cellnet and Detroit SMSA over the terms and conditions for the resale of Detroit SMSA's cellular service by Cellnet.[4] In Count II of its district court complaint, Cellnet generally alleges that Detroit SMSA has been in breach of a 1986 agreement[5] between the parties by providing services to its "retail arm" on more favorable terms and conditions than those provided to Cellnet.[6] In Count III of the complaint Cellnet contends that, irrespective of whether the 1986 agreement is in itself binding, Detroit SMSA has violated the Commission's requirement that cellular service providers offer services to resellers on the same terms and conditions as to its own distribution arm.[7] Following the submission of responsive pleadings by Detroit SMSA, in which it disputed the applicability of any Commission requirements to its cellular service offerings, the court issued its *Referral Order* specifying the following issues for Commission resolution:

> 1. Is the quoted policy in *Cellular Communications Systems*, 86 FCC 2d 469, 511 (1981), a binding rule or requirement, to wit:
>
> > [W]e shall require that AT&T and its underlying cellular affiliate provide system capacity to non-affiliated retailers or resellers on a non-discriminatory basis and on the same terms and conditions as its own distribution arm.
>
> 2. If the answer is "yes," does the policy apply to defendant given its current organizational structure?
>
> 3. If the answers to questions 1 and 2 are "yes," then how do the "same terms and conditions" apply and how are "terms and conditions" determined?[8]

Before addressing these issues and the specific contentions of the parties, a brief review of the evolution of the Commission's cellular resale requirement is helpful.

II. CELLULAR RESALE REQUIREMENT

3. The Commission's prohibition against cellular resale restrictions has its origins in the 1976 Commission decision regarding the resale and shared use of common carrier services.[9] The Commission reviewed certain provisions in the tariffs of carriers that restricted or prohibited resale of private line services and determined that by restricting subscribers' use of their communications service, such tariff provisions were unjust and unreasonable under Section 201(b) of the Communications Act (Act).[10] The Commission also concluded that such restrictions were unjustly and unreasonably discriminatory, and in violation of

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[1] Cellnet is a Michigan corporation with its principal offices in Madison Heights, Michigan. Cellnet is a non-facilities-based reseller of cellular service in the Detroit market. It purchases cellular telephone services in bulk from, among others, Detroit SMSA.

[2] Detroit SMSA is a Delaware limited partnership with its principal offices in Schaumberg, Illinois. Detroit SMSA, whose general partner is Ameritech Mobile Phone Service of Detroit, is the wireline cellular licensee for the Detroit-Ann Arbor, Michigan metropolitan service area (MSA).

[3] *Cellnet Communications, Inc. v. Detroit SMSA Limited Partnership*, Order Referring Issues to the Federal Communications Commission, Civil No. 88 CV-71292 DT (E.D. Mich. Jan. 30, 1991) (*Referral Order*).

[4] The Commission has defined resale as "activity wherein one entity subscribes to the communications services and facilities of another entity and then reoffers communications services and facilities to the public (with or without adding value') for profit." Resale and Shared Use of Common Carrier Facilities, 60 FCC 2d 261, 271 (1976) (*Resale & Shared Use*). The Commission also held that resale of communications service is a common carrier activity subject to Title II of the Communications Act. *Id.* at 316.

[5] Answer, exhibit 1.

[6] *See* Complaint, exhibit B (*TRAC Communications v. Detroit SMSA*, Civil No. 88-CV 71292 CT, Amended Complaint at 7-9 (E.D. Mich. filed May 2, 1989)). Prior to 1990, plaintiff's name was TRAC Communications, Inc. Complaint at 2, n.2.

[7] *Id.*, exhibit B at 9-10.

[8] *See Referral Order* at 2-3. The court did not ask the Commission for its opinion on either the merits of the court's case or the issue of damages, and we do not address those points in this Order.

[9] *Resale & Shared Use*, 60 FCC 2d 261, *modified on other grounds*, 62 FCC 2d 588 (1977), *aff'd sub nom. AT&T v. FCC*, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978); *see also Resale & Shared Use of Common Carrier Domestic Public Switched Network Services*, 83 FCC 2d 167, 193 (1980).

[10] Resale & Shared Use, 60 FCC 2d at 280-81, 321. Section 201(b) of the Act requires "[a]ll charges, practices, classifications, and regulations for and in connection with each communication service, [to] be just and reasonable." 47 U.S.C. § 201(b).

Section 202(a) of the Act because they would "effectively foreclose a certain class of potential subscribers from obtaining carrier services and facilities."[11]

4. In 1981, when the Commission amended its rules to authorize commercial cellular communications, it extended its *Resale and Shared Use* requirement of unrestricted resale to cellular service, stating that in its view, "the most important issue involving cellular resale is whether cellular system tariffs will restrict resale."[12] Because the Commission continued to believe that any restrictions on the resale of cellular service would violate Sections 201(b) and 202(a) and would be contrary to the public interest, it stated that it would "condition radio licenses awarded to system operators such that no restrictions on resale and shared use of cellular service will be permitted."[13]

5. During the *Cellular Communications Systems* proceeding, AT&T submitted a plan by which it proposed to operate as a wholesale cellular carrier and to provide system capacity to retail distribution entities, including its own proposed separate subsidiary.[14] The Commission stated: "we shall require that AT&T and its underlying cellular affiliate provide system capacity to non-affiliated retailers or resellers on a non-discriminatory basis and on the same terms and conditions as its own distribution arm."[15] The Commission believed at the time that this structural separation of a licensee's retail cellular activity would encourage competitive entry and interconnection for competing resellers on the same basis as for the licensee's subsidiary.[16]

6. When the Commission first enunciated its cellular resale requirement, it did not distinguish between resale of services of wireline and nonwireline carriers.[17] In the years since its adoption, the Commission has expanded, clarified, and applied the rule in a number of cases.[18] Consistently, the Commission has held that restrictions on the resale of cellular service would violate the Act and be contrary to the public interest.[19]

7. In 1991, while initiating a rulemaking proceeding to consider proposed changes to its cellular resale rules, the Commission emphasized the benefits of its long-standing requirement that cellular carriers permit resellers to take service on the same terms and conditions as any other cellular customer would take service.[20] The Commission noted that as common carriers, cellular licensees must under Sections 201(b) and 202(a) of the Act provide reasonable service upon request to similarly-situated persons and on a nondiscriminatory basis.[21] The Commission declared that its current requirement that there be no restrictions of cellular resale would continue to apply with full force to the cellular industry, that cellular licensees must make any volume discounts offered to large retail customers available to resellers on the same terms and conditions, and that resellers must be permitted to resell cellular services on the same terms and conditions as offered to retail customers.[22]

8. In addition, the Commission clarified that it "has never required [facilities-based] cellular companies to establish separate wholesale and retail operations."[23] The existence of a separate retail distribution arm is irrelevant, however, in determining whether a cellular carrier's service offering is discriminatory within the meaning of Section 202(a) of the Act. The Commission made clear in its *Cellular Resale NPRM* that the nondiscrimination standard of its cellular resale requirement compels a facilities-based carrier offering service to certain customers to make that service available to resellers as well "on a non-discriminatory basis and on the same terms and conditions as made available to other *similarly-situated customers*."[24] We turn now to the specific questions referred by the court.

III. DISCUSSION

A. Issue I: Is the quoted policy in *Cellular Communications Systems*, that the Commission "shall require that AT&T and its underlying cellular affiliate provide system capacity to non-affiliated retailers or resellers on a non-discriminatory basis and on the same terms and conditions as its own distribution arm," a binding rule or requirement?

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[11] *Resale & Shared Use*, 60 FCC 2d at 281, 321. Section 202(a) prohibits "any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities or services." 47 U.S.C. § 202(a).

[12] *The Use of Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems*, CC Docket No. 79-318, Notice of Proposed Rulemaking, 78 FCC 2d 984 (1980) (*Cellular Communications Systems NPRM*), Report and Order, 86 FCC 2d 469, 510 (1981) (*Cellular Communications Systems*), *modified*, 89 FCC 2d 58, *further modified*, 90 FCC 2d 571 (1982), *petition for review dismissed sub nom. United States v. F.C.C.*, No. 82-1526 (D.C. Cir. Mar. 3, 1983).

[13] *Cellular Communications Systems*, 86 FCC 2d at 511.

[14] Specifically, AT&T proposed that "[c]arriers authorized to provide cellular service would be authorized to provide cellular system call carrying capacity to other common carriers at the same price they provide such capacity to their own distribution entities." *Cellular Communications Systems NPRM*, Appendix, 78 FCC 2d at 1011-12.

[15] *Cellular Communications Systems*, 86 FCC 2d at 511.

[16] *Id.*

[17] *See TRAC Communications, Inc. v. Detroit Cellular Tel. Co.*, 5 FCC Rcd 4647 (1990) (*TRAC Communications*).

[18] *See, e.g., James F. Rill*, 60 R.R. 2d 583, 598 (1986) (extending Commission cellular resale requirement to affiliates of BOCs); *TRAC Communications*, 5 FCC Rcd at 4648 ("the Commission's unrestricted resale policy and requirements for cellular licensees have been applicable to all such licensees, both wireline and nonwireline carriers, since the Commission adopted its cellular rules in 1981.").

[19] *See, e.g., Continental Mobile Tel. Co., et al. v. Chicago MSA Ltd Partnership*, 7 FCC Rcd 2675 (Com. Car. Bur. 1992), *application for review denied*, FCC 94-50 (adopted Mar. 7, 1994).

[20] *Petition for Rule Making Concerning Proposed Changes to the Commission's Cellular Resale Policies*, CC Docket No. 91-33, 6 FCC Rcd 1719 (1991) (*Cellular Resale NPRM*), 7 FCC Rcd 4006 (D.C. Cir. 1992) (*Cellular Resale Order*), *aff'd sub nom. Cellnet Communications v. F.C.C.*, 965 F.2d 1106 (D.C. Cir. 1992).

[21] *Cellular Resale NPRM*, 6 FCC Rcd at 1725, 1730 n.70. Congress recently amended Section 332 of the Act, replacing private and public mobile service categories with two new categories of mobile services, commercial mobile radio service (CMRS) and private mobile radio service (PMRS), and treats CMRS providers, which includes cellular service providers, as common carriers. The common carrier obligations of Section 201(b) and 202(a) continue for all CMRS providers. *Implementation of Sections 3(n) and 332 of the Communications Act*, 9 FCC Rcd 1411, 1417 (1994).

[22] *Cellular Resale NPRM*, 6 FCC Rcd at 1720, 1724.

[23] *Id.* at 1726.

[24] *Id.* at 1725-26 (emphasis added).

1. Contentions of the Parties

9. In referring the issue to the Commission, the court expressed concern that because the above quote from the Commission concerning its cellular resale restriction was expressed in the text of a Report and Order, but not in the Code of Federal Regulations (CFR), the statement "same terms and conditions" might not qualify as a "binding rule or requirement." The court cited *Pacific Gas and Electric v. F.P.C.*,[25] in which the Court of Appeals for the District of Columbia Circuit noted a distinction between a "rule" and a "general statement of policy." *Pacific Gas* concluded that a "general statement of policy is the outcome of neither a rulemaking nor an adjudication . . ., [that a] general statement of policy . . . does not establish a 'binding norm,' [and that an] agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy."[26]

10. Complainant Cellnet argues that *Pacific Gas* is not dispositive because the Commission adopted the "same terms and conditions" requirement after a notice and comment rulemaking. Therefore, Cellnet contends, the quoted statement constitutes a binding rule or requirement,[27] and cellular licensees, such as Detroit SMSA, are required to offer service on the same terms and conditions as those provided to the carrier's own distribution arm.

11. Detroit SMSA does not dispute whether the same terms and conditions requirement is binding, but rather it contends that when the Commission adopted its cellular resale requirement in *Cellular Communications Systems*, it intended the requirement to apply only to a cellular licensee that maintains a separate distribution arm that resells the licensee's service to the public, not to cellular licensees that sell all of their service directly to end users and unaffiliated resellers. Defendant claims that the resale requirement was adopted specifically in response to AT&T's proposal to market cellular service directly to end users, so that AT&T could avoid being dependent on nonaffiliated resellers to foster demand for its cellular service. According to Detroit SMSA, AT&T proposed to distribute its service to several resellers, including its own, under the same terms and conditions.[28]

12. Detroit SMSA further contends that in the 10 years since the adoption of the resale requirement, the Commission has never indicated that this obligation should apply to cellular licensees that provide service directly to end users rather than through a separate distribution arm, as proposed by AT&T. In the absence of a licensee's own distribution arm, defendant argues, the requirement has no meaning because there are no "same terms and conditions" available. Further, according to Detroit SMSA, the Commission has never required cellular companies to establish separate wholesale and retail operations.[29]

2. Discussion

13. The Commission's cellular resale requirement is a binding, uncodified substantive rule adopted through notice and comment rulemaking. The Commission adopted this requirement using clearly mandatory terms: "*no* restrictions . . . *will* be permitted;"[30] "we *shall require* AT&T . . .."[31] Subsequently, when the Commission reexamined its requirement, the Commission stated that "[w]e also clarify our requirement that resale capacity be provided on a non-discriminatory basis."[32] Once again, the Commission used mandatory terms, such as "prohibit," "must," and "requirement." Finally, in a decision by the Court of Appeals for the D.C. Circuit, the Commission's clarification of its cellular resale rules was affirmed in terms that support the proposition that the requirement is a binding (albeit uncodified) rule.[33]

14. As established in the Commission's decisions pertaining to cellular resale, cellular licensees are required to provide service to similarly situated customers on a nondiscriminatory basis and on the same terms and conditions. When it first considered the resale of common carrier services, the Commission viewed the issue of resale restrictions as sufficiently complex to require a broad notice-and-comment rulemaking.[34] When the Commission proposed to extend its resale policies to cellular services in 1981, it again initiated a rulemaking proceeding, and specifically requested comments on whether any restrictions or requirements should be imposed regarding resale. The Commission's view was that "the most important issue involving cellular resale [was] whether cellular system tariffs will restrict resale."[35]

15. In *Pacific Gas*, the D.C. Circuit case that apparently gave rise to the court's concerns, the order at issue was "entitled and consistently referred to by the [FPC] as a general statement of policy."[36] That order proposed to implement an FPC plan which would serve only as a guide in other proceedings. It was issued without prior notice or opportunity for public comment or participation. "[T]he stated purpose of Order No. 467 was not to provide an inflexible, binding rule but to give advance notice of the general policy . . .."[37]

16. It is clear that the Commission's same terms and conditions requirement is not a general statement of policy. The requirement, adopted by the Commission as part of its cellular resale rules, was the outcome of a notice and comment rulemaking, in accordance with Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, in which the views of all participating parties were considered.[38] Although "a general statement of policy [may be] adopted without public participation,"[39] that is not what occurred in this instance.

17. Accordingly, in answer to the court's first question, the Commission's statement in its *Cellular Communications Systems*, as subsequently modified and clarified by the

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25 506 F.2d 33 (D.C. Cir. 1974).
26 *Pacific Gas*, 506 F.2d at 38.
27 Complaint at 5-6.
28 Answer at 3, 16, 23, and Exhibit 1 at 9, 12, 16.
29 Answer at 6-7, 15-16, 26, 29.
30 *Cellular Communications Systems*, 86 FCC 2d at 511 (emphasis added).
31 *Id.* (emphasis added).
32 *Cellular Resale NPRM*, 6 FCC Rcd at 1719.
33 *Cellnet Communications v. FCC*, 965 F.2d 1106, 1108.
34 *Resale & Shared Use*, 60 FCC 2d at 262.
35 *Cellular Communications Systems*, 86 FCC 2d at 510.
36 *Pacific Gas*, 566 F.2d at 40 (footnote omitted).
37 *Id.*
38 *Cellular Communications Systems NPRM*, 78 FCC 2d at 996-97.
39 *Pacific Gas*, 556 F.2d at 39.

Commission and affirmed by the appellate court, is binding, and requires facilities-based cellular licensees to provide service to similarly-situated customers under the same terms and conditions and on a nondiscriminatory basis.

B. Issue II: If the "same terms and conditions" policy is a binding requirement of the agency, does that cellular policy apply to Detroit SMSA given its current organizational structure?

1. Contentions of the Parties

18. Cellnet urges the Commission to answer the court's question in the affirmative, because, according to Cellnet, Detroit SMSA continues to operate its retail cellular distribution arm. Cellnet claims that the only changes that Detroit SMSA made were accounting ones, not a physical restructuring of its operation to eliminate the retail subsidiary, as Detroit SMSA asserts. Cellnet notes that although the Commission did not command a particular structure to accomplish the desired result of its cellular resale restriction enunciated in its *Cellular Communications Systems*, Detroit SMSA is attempting to evade its same terms and conditions obligations by recharacterizing its affiliate's functions.[40] Cellnet argues that Detroit SMSA's "organizational structure" has remained materially the same since 1984.

19. Detroit SMSA counters by arguing that it offers service directly to end users and unaffiliated resellers and has no distribution arm for the purposes of resale. Therefore, Detroit SMSA contends, the Commission's cellular resale restriction is not applicable. Detroit SMSA admits that one of its subsidiaries acted as its retail distribution arm prior to September 30, 1986, but states that it implemented changes that eliminated its subsidiary's role as a reseller of Detroit SMSA's service.[41]

2. Discussion

20. The answer to the court's second question is yes. In *Cellnet Communications*, the court agreed that the Commission's cellular resale rules "barred facilities-based carriers from restricting resale to non-facilities-based resellers and from discriminating against purchasers for resale.[42] In its *Cellular Resale NPRM*, in a passage clarifying the rule against resale restrictions, the Commission stated that it "had never required cellular companies to establish separate wholesale and retail operations."[43] The court explicitly affirmed this clarification.[44]

21. The Commission's cellular resale requirement, as clarified above,[45] applies to the defendant regardless of its current organizational structure. As discussed above, cellular licensees are required to provide service to similarly-situated customers under the same terms and conditions on a nondiscriminatory basis. The fact that Detroit SMSA claims not to have a retail distribution arm for its cellular offerings is irrelevant to its obligation as a facilities-based cellular licensee.

C. Issue III: if the answers to questions 1 and 2 are "yes," how do those "same terms and conditions" apply and how are "terms and conditions" determined?

1. Contentions of the Parties

22. Cellnet contends that in defining "terms and conditions," the Commission must consider whether the objective of its cellular resale requirement, free and fair competition at the retail level, has been achieved. Cellnet asserts that the structural separation originally proposed by AT&T that gave rise to the Commission's cellular resale requirement was such that the cellular licensee, AT&T, would operate as a wholesaler, with distribution to end users by AT&T's separate distribution arm, as well as by unaffiliated resellers.[46] According to Cellnet, this separation was intended, *inter alia*, to prevent discrimination by the cellular licensee against retail competitors and subsidization of the cellular licensee's competitive services.[47]

23. Cellnet argues that one of the terms and conditions that must be considered is the existence of any subsidy of the licensee's retail division by its wholesale division, and charges that the terms and conditions under which Detroit SMSA provides cellular service to its retail division includes a subsidy to offset the retail division's losses.[48]

24. Without responding to the court's third question, Detroit SMSA generally denies Cellnet's allegations that it subsidizes any retail division, and again denies that it has any obligation to maintain its operations in the manner proposed by AT&T in *Cellular Communications Systems NPRM*, or to maintain wholesale and retail operations as separate profit centers. Detroit SMSA argues that the Commission never intended that its same terms and conditions requirement be applied to a hypothesized distribution arm created through arbitrary cost and revenue allocations, such as it claims Cellnet is proposing.[49]

2. Discussion

25. Cellnet does not specifically address the court's third question regarding the manner in which "the same terms and conditions" are determined and applied. Instead, Cellnet argues that the Commission should weigh the procompetitive objectives of its cellular resale requirement and consider the existence of any subsidy of Detroit SMSA's retail division by its wholesale division as a term and condition. It appears that Cellnet is attempting to bolster the argument it made in response to the Court's second question that Detroit SMSA is evading the same terms and conditions requirement by providing cellular service through a retail cellular distribution arm. Cellnet's arguments miss the point. As we stated in addressing the Court's second question above, the fact that a cellular licensee has a retail distribution arm for its cellular offerings is irrelevant to its obligation to provide service to similarly-situated customers, including resellers, under the same terms and conditions.

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[40] Complaint at 27-28.
[41] Answer at 7, 25, 29.
[42] 965 F.2d at 1109.
[43] FCC Rcd at 1726.
[44] *Cellnet Communications*, 965 F.2d at 1110-11.
[45] *See supra*, paras. 9-17.
[46] Complaint at 31.
[47] *Id.* at 31-32.
[48] *Id.* at 49-50.
[49] Answer at 15-16, 27.

26. In answer to the court's third question, the terms and conditions of a particular service offering are discerned from the four corners of the agreement or tariff governing that offering. In a complaint proceeding under Section 208 of the Communications Act, the burden would be on the complainant to plead facts that would tend to show that a facilities-based cellular licensee has included provisions in a tariff or agreement that would foreclose similarly-situated customers from ordering the same or substantially similar service under the same terms and conditions or, that the licensee has failed to provide such service under the same terms and conditions.[50] In the latter case, to determine whether the same terms and conditions governed two offerings, the Commission would compare the agreements or tariffs governing those offerings. Such requirements as minimum deposits to start service, minimum usage commitments, and rate levels for different services are typical of the terms and conditions that the Commission would compare.

27. Similarly, how such terms and conditions are applied would be a question of fact. To satisfy the same terms and conditions requirement, licensees must be willing to provide substantially similar service to similarly-situated customers.[51] Once the terms and conditions of an offering are identified, the Commission would expect the licensee to offer those same terms and conditions to any similarly situated customers requesting that service.[52] Based upon evidence developed through the complaint process, the Commission would determine whether this was in fact occurring.

IV. CONCLUSION AND ORDERING CLAUSES

28. We grant Cellnet's complaint to the extent that it seeks rulings on issues referred by the United States District Court, Eastern District of Michigan, regarding the Commission's cellular resale requirement. We conclude that the Commission's cellular resale requirement, as discussed above, is a binding requirement on cellular licensees, and applies to Detroit SMSA regardless of its organizational structure. In addition, we address the court's specific questions regarding the application of the Commission's "same terms and conditions" requirement to cellular licensees.

29. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 208 of the Communications Act, 47 U.S.C. §§ 154(i), 208, and the authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that Cellnet's complaint IS GRANTED, to the extent discussed above.

30. IT IS FURTHER ORDERED that the Chief, Formal Complaints and Investigations Branch, shall send a copy of this Memorandum Opinion and Order via Certified U.S. Mail, Return Receipt Requested, to the Honorable Avery Cohn, United States District Court, Eastern District of Michigan, 219 Federal Building and U.S. Courthouse, Detroit, Michigan 48226.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief (Policy)
Common Carrier Bureau

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[50] 47 U.S.C. § 208. It is well established that in a Section 208 complainant proceeding the complainant has the burden of proof. *See, e.g.*, Amendment of Rules Concerning Procedures to be followed When Formal Complaints are Filed Against Common Carriers, 8 FCC Rcd 2614, 2616-17 (1993); Connecticut Office of Consumer Counsel v. AT&T Communications, 4 FCC Rcd 8130, 8133 (1989), *aff'd sub nom. Connecticut Office of Consumer Counsel v. FCC*, 915 F.2d 75 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1310 (1991).

[51] *See, e.g.*, AT&T Communications, Revisions to Tariff F.C.C. No. 12, 6 FCC Rcd 7039, 7047, 7052 (1991) (requiring substantially similar options in an interexchange carrier's contract tariff offerings to be available to any similarly-situated party, including resellers, upon request). Id. at 7053. *See also Sea-Land Service, Inc. v. I.C.C.*, 738 F.2d 1311, 1316-17 (D.C. Cir 1984); *MCI Telecommunications Corp. v. FCC*, 917 F.2d 30, 38-39 (D.C. Cir 1990).

[52] In its *Cellular Resale NPRM*, the Commission suggested that requirements that certain customers "make deposits, meet minimum number limitations and the like, which are not also imposed on other customers" would appear unlawfully discriminatory. In addition, the Commission stated that the practice of offering "preferred customers bulk rates that are lower than wholesale rates, while at the same time not making these bulk rates available to resellers would appear discriminatory." The Commission indicated that under its resale rules, "facilities-based carriers offering a bulk rate to certain customers must make that bulk rate available to resellers on the same terms and conditions as made available to similarly situated customers." *Cellular Resale NPRM*, 6 FCC Rcd at 1725.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TKR Cable Company of Ramapo
in the following communities:
Mahwah, New Jersey (CUID No. NJ0421)
Sloatsburg, New York (CUID No. NY0905)
Tuxedo, New York (CUID No. NY0906)

Requests for Confidentiality

ORDER

Adopted: July 6, 1994; Released: July 7, 1994

By the Chief, Cable Services Bureau:

1. The Commission has received requests filed by TKR Cable Company, d/b/a TKR Cable Company of Ramapo ("TKR"), that information submitted by TKR pursuant to Section 76.956 of the Commission's rules not be routinely available for public inspection as it otherwise would be pursuant to our rules.[1] For the reasons set forth below, we deny TKR's request.

2. In response to complaints regarding the rates charged for cable programming service in three communities, TKR filed FCC Forms 393 pursuant to Commission rules.[2] The submissions were accompanied by requests that none of the information contained in the rate justifications be made routinely available for public inspection pursuant to Section 0.459 of the Commission's rules. TKR contended that the material was confidential proprietary information, consisting of the details of its revenues, expenses (identified by category), profits and losses.

3. Section 0.459 of the Commission's rules provides that a party submitting information to the FCC may request confidentiality with respect to specific portions of the material. However, the party must show by a preponderance of the evidence that non-disclosure is consistent with the provisions of the Freedom of Information Act, 5 U.S.C. §552 ("FOIA").[3] Exemption 4 of the FOIA authorizes the Commission to withhold from public disclosure trade secrets as well as confidential commercial or financial information.[4]

4. Exemption 4 of the FOIA covers two broad categories: (1) trade secrets; and (2) information which is (a) commercial or financial, and (b) obtained from a person, and (c) privileged or confidential.[5] The confidential or privileged criterion is satisfied if either (1) disclosure of the information is likely to impair the government's ability to obtain necessary information in the future or (2) disclosure is likely to cause substantial harm to the competitive position of the person from whom the information was obtained.[6]

5. In this case, TKR does not claim that the information constitutes a trade secret. TKR asserts that the information is commercial or financial information submitted pursuant to a regulatory requirement and thus is required to show that the information is privileged or confidential. With respect to the "impairment" prong of the "confidential or privileged" criterion, we conclude that the FCC's information-gathering abilities in this context would not be impaired. The 1992 Cable Act specifically requires cable operators to file annually with the Commission or franchising authorities such financial information as is necessary to administer and enforce cable service rate regulation.[7] Therefore, the pivotal question is whether, pursuant to the second prong of the test, disclosure of the material is likely to cause substantial competitive harm to TKR.

6. The Commission has said, "While an elaborate economic analysis need not be made to establish the likelihood of substantial competitive injury, conclusory and generalized allegations cannot support nondisclosure."[8] In addition, requests for confidentiality must conform to Section 0.459 of the rules and "casual" requests for confidentiality will not be honored.[9] In this case, TKR has claimed that the submission contains detailed financial information similar to that routinely afforded protection under Section 0.457(d)(1)(i), (iii) and (iv) of our rules. However, TKR has made no allegations concerning the likelihood of competitive harm which would result if the materials are made available for public inspection.

7. We conclude, therefore, that TKR has failed to demonstrate any likelihood of competitive injury resulting from disclosure of the rate justification materials. Furthermore, there is a compellingppublic interest supporting dis-

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[1] *See* 47 C.F.R. §0.455(a)(11) (1993).

[2] "FCC Form 393" is the shorthand name for "Determination of Maximum Initial Permitted Rates For Regulated Cable Programming Services and Equipment," the official form used by cable operators to show that regulated rates charged for the basic service and cable programming services tiers conform with the FCC's benchmark. A cable operator files an FCC Form 393 with a local franchising authority in response to notification that the local franchising authority is certified and is regulating basic service tier rates. A cable operator also files an FCC Form 393 with the FCC in response to a complaint about rates charged for the cable programming service tiers. *See Report and Order and Further Notice of Proposed Rulemaking* in MM Docket No. 92-266, 8 FCC Rcd 5631 (1993).

[3] 47 C.F.R. §0.459(d).

[4] *See* 5 U.S.C. §552(b)(4) (1993).

[5] *Id.*

[6] *Nat'l Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The Court of Appeals later reaffirmed this test, but confined it to those cases involving information that persons were *required* to provide the government. *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992) ("Critical Mass II"). In cases involving financial or commercial information that was supplied *voluntarily* to the government, Exemption 4 applies if the information is of a kind that the provider would not customarily release to the public. *Id.* at 879-880.

[7] *See* Section 623(g) of the Communications Act of 1934, as amended by Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, §3, 47 U.S.C. §543(g).

[8] *National Exchange Carrier Ass'n, Inc.* (Release of Common Line Pool Audit Report), 5 FCC Rcd 7184 (1990) (quoting *Nat'l Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673, 680-81 (D.C. Cir. 1976)) ("*NECA*").

[9] *See* 47 C.F.R. §0.459(c); *Western Cities Broadcasting, Inc.*, 6 FCC Rcd 3599, 3600 (1991).

closure of rate justification information.[10] Subscribers have a vital interest in the conduct and outcome of cable rate proceedings which are based upon these materials. For all of these reasons, we find that TKR has failed to make a showing adequate to warrant the granting of its requests for confidentiality.[11]

8. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), that the requests of TKR Cable Company for confidentiality of its rate justification materials IS DENIED.

9. IT IS FURTHER ORDERED, pursuant to Section 0.459(g) of the Commission's rules, the Cable Services Bureau will provide TKR Cable Company with notice of this denial and the time for seeking review by the Commission or a judicial stay by telephone, with follow-up notice in writing.

10. IT IS FURTHER ORDERED, pursuant to Section 0.459(g) of the Commission's Rules, that TKR's rate justification materials will be available for public inspection on the sixth working day following the oral notice of this Order to TKR Cable Company. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[10] *See, e.g. NECA*, 5 FCC Rcd at 7185 (presence of compelling public interest supported disclosure of financial data); *Bell Communications Research, Inc.*, 7 FCC Rcd 891, 892 (1992) (same); *New York Telephone Co.*, 5 FCC Rcd 874 (1990) (same).

[11] We note that we have received comparatively few requests for confidentiality in conjunction with the more than 4,000 FCC Form 393s filed to date.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-24

In re

Amendment of Part 74 of the
Commission's Rules With Regard
to the Instructional Television
Fixed Service

ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: June 9, 1994 **Released: July 6, 1994**

Comments Due: August 29, 1994
Reply Comments Due: September 28, 1994

By the Commission:

1. By this *Order and Further Notice of Proposed Rulemaking,* the Commission continues to consider amending its rules to alter the procedures governing the acceptance of applications for new Instructional Television Fixed Service (ITFS) stations, major amendments to such applications, or major changes in existing stations. We also seek comment on several additional proposals put forth by the commenters and on our own motion intended to increase the efficiency and curtail potential abuse of our application processes.[1] Finally, we modify the freeze on the filing of major change applications that we adopted earlier in this proceeding to permit the filing of major change applications and any competing applications thereto.

INTRODUCTION

2. Our goal in this proceeding is to enhance the efficiency of our processing of ITFS applications. Since 1985, applicants for new ITFS stations or major changes in existing stations have been subject to an A/B cut-off procedure.[2] We questioned in the *Notice of Proposed Rulemaking* in this proceeding whether this procedure is appropriate for the rapidly evolving ITFS service.[3] We stated that the telecommunications environment has changed substantially since 1985, when the Commission instituted the cut-off procedure.[4] We further observed that the overwhelming majority of tendered applications now include excess capacity lease agreements with wireless cable operators.[5] The *Notice* asserted that these changes have fostered a substantial increase in the rate of applications filed for new ITFS stations or major changes in existing stations, creating a significant backlog of applications. We therefore proposed a window filing procedure to allow us better to control the flow of applications, thereby improving processing efficiency.

3. Based on the present record, we believe that adoption of the window filing system for the ITFS service would likely promote application processing efficiency. We are also persuaded, however, that before adopting a window approach, the Commission should consider both the need for and the means of curbing potential abuses of the window process. Accordingly, after addressing the proposed ITFS window filing system, we shall address several specific proposals intended to augment the benefits of a window filing system and avoid potential abuse. We seek through these proposals ways either to limit alleged abuses of our filing procedures or to otherwise enhance our processing efficiency to hasten service to the public. Finally, we shall modify the freeze on the filing of major change applications.

THE WINDOW FILING SYSTEM

4. *Background* In the *Notice* we proposed to accept only during limited periods (or "windows") the filing of applications for new facilities, applications for major changes in existing facilities, and major amendments to pending ap-

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[1] We will revise FCC Application Form 320, which is used by applicants seeking a construction permit and license for new ITFS facilities or for major changes in existing facilities, as necessary to implement whatever changes are adopted.

[2] This procedure involves placing the first application(s) accepted for filing and determined to be substantially complete on a public notice called an "A cut-off list." This list notifies the public that the application has been accepted and gives interested parties 60 days to file competing applications or petitions to deny. An applicant placed on the "A" cut-off list is required to make any major changes to its proposal before the end of the "A" cut-off period. After the "A" period expires, the staff places all substantially complete applications which were filed during that period and found to be mutually exclusive with any listed "A" application on a "B" list. This list notifies the public that the specified applications have been accepted for filing, and it provides 30 days for the filing of petitions to deny or minor amendments.

[3] *Notice of Proposed Rulemaking* in MM Docket No. 93-24, 8 FCC Rcd 1275 (1993) (*Notice*).

[4] *Id.* at 1275, citing *Second Report and Order* in MM Docket No. 83-523, 101 FCC 2d 49 (1985). Specifically, we noted that we have modified the minimum programming requirements for new ITFS operators; *Report and Order* in Gen. Docket Nos. 90-54 and 80-113 (*Wireless Cable Order)* 5 FCC Rcd 6410, 6416 (1990); authorized 15-mile interference protection for ITFS licensees which lease excess capacity for wireless cable operations; *Order on Reconsideration* in Gen. Docket Nos. 90-54 and 80-113 (*Wireless Cable Reconsideration)* 6 FCC Rcd 6764, 6766-67 (1991); authorized the use in some situations of channel mapping technology by ITFS licensees and wireless cable lessees; *Id.* at 6774; and modified our "ready recapture" requirement with regard to excess channel capacity leasing by eliminating unduly restrictive time-of-day and day-of week regulations. *Id.* We do not intend to suggest by our use of the term "wireless cable" that it constitutes "cable" service for statutory or regulatory purposes.

[5] In 1983, the Commission authorized ITFS licensees to lease their excess channel capacity to wireless cable operators. *Report and Order* in Gen. Docket No. 80-112 (*Instructional TV Fixed Service),* 94 FCC 2d 1203 (1983). Now, more than 90% of recently filed applications contain an excess capacity lease, and the wireless cable lessee almost always pays for the construction of the ITFS facilities. *Notice* at 1276.

plications.[6] Pursuant to the proposal, the Commission would give Public Notice no fewer than 60 days before opening a filing window, so as to provide adequate time for potential applicants to prepare. We further proposed that the window remain open for a specified number of days. We would place on a proposed grant list applications filed in the window not mutually exclusive with any other application and found to be acceptable; we would place mutually exclusive applications on Public Notice. In each case, we would provide 30 days for the submission of petitions to deny. Single, uncontested applications would then be granted, while winners would be selected from among the mutually exclusive applications pursuant to the existing selection process.[7] Moreover, consistent with our *Notice*, applications tendered but not yet placed on an "A" cut-off list would be treated as having been filed and cut off as of the close of the first filing window.

5. We tentatively concluded in the *Notice* that the A/B cut-off system has prevented ITFS and wireless cable systems from reaching their full potential. We observed that recent changes in the service have encouraged a substantial increase in the number of applications submitted. We also noted that the existing system requires duplicative processing of applications, creating an inefficient allocation of scarce Commission resources. The *Notice* suggested that this double processing contributed to a significant backlog of applications.[8] Greater control over the flow of applications and the elimination of double processing, we stated, would make our analysis of applications substantially more efficient. However, consistent with existing practice, we would make an exception for major changes that would resolve mutually exclusive applications. We would accept applications for such changes at any time, and we would provide a 30-day period for the submission of petitions to deny. We believe that this exception would most efficiently inaugurate new or improved service to the public.

6. While most commenters agree that the current filing system is inefficient and unnecessary,[9] they are divided on the adoption of a window filing procedure. Supporters of the proposal generally agree that a window filing procedure will help eliminate the inefficiencies resulting from the A/B cut-off system that were discussed in the *Notice*.[10] Under the A/B cut off system, educators with wireless cable lessees would at times file applications simply to be mutually exclusive with applicants listed on an "A" cut-off list. The Educational Parties acknowledge that the proposed window filing procedure would eliminate this practice.[11]

7. However, several commenters argue that the adoption of a filing window system without concomitant safeguards against abuse would not increase processing efficiency.[12] According to these parties, a window filing system would encourage some wireless cable entities to persuade educational institutions to submit excessively large and unrealistic numbers of applications, thereby allowing the wireless cable entity to warehouse spectrum. These commenters assert that such wireless cable entities do not intend to construct, but rather seek a profitable bargaining position with allegedly "legitimate" wireless cable developers. They claim that such frequency speculators would file a substantial number of applications for channels throughout the country during the first window, in order to maximize their later bargaining position.

8. The commenters add that a wireless cable operator that plans to construct may not be ready during a filing window to associate with schools and prepare its applications. As a result, they argue, the window would prevent such "legitimate" entities from being able, through their affiliation with educators, to file against the applicant whose lessee does not intend to construct. Alternatively, these parties assert that wireless cable operators that do intend to construct would have to file applications in every market in which they hope eventually to operate, in order to protect themselves from spectrum speculators.[13] They add that these consequences of a filing window would diminish processing efficiency.

9. The National ITFS Association (NIA) notes the advantages of a window filing system in commercial settings. However, it argues that such a system is inappropriate for educational applicants not associated with a wireless cable lessee, because they require up to 18 months to approve the project and authorize the funds needed for construction. Thus, NIA states that such institutions would not be able to respond in time to a Public Notice of a window, especially during summer vacation. Due to the scarcity of funds, NIA adds, educators would not likely devote funds to planning and constructing an ITFS facility solely on the chance that a window might open at an appropriate time in the future.[14] The Educational Parties similarly maintain that educators that do not rely on excess capacity lessees need more time to approve and fund ITFS facilities. Finally, several parties assert that any window filing procedure must account for the annual January grant application deadline of the National Telecommunications and Information Administration (NTIA).[15]

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[6] We would continue to accept at any time the filing of applications for minor changes, as defined by Section 74.911(a) of the Commission's Rules.

[7] With regard to mutually exclusive applications, we would consider only those petitions to deny that were filed against the eventual winner.

[8] Duplicative processing is discussed in further detail in paragraph 10, below.

[9] *See, e.g.*, Paul Jackson Enterprises (Jackson) Comments at 1. *See also Notice* at 1275-76.

[10] RuralVision South, Inc. and RuralVision Central, Inc. (RuralVision) Comments. American Council on Education, American Association of Community Colleges, Arizona Board of Regents for Benefit of the University of Arizona, Association for Higher Education, California State University - Sacramento, Iowa Public Broadcasting Board, South Carolina Educational Television Commission, State of Wisconsin - Educational Communications Board, St. Louis Regional Educational and Public Television Commission, University of Maine System, University of Wisconsin System, and University System of the Ana G. Mendez Educational Foundation (collectively, Educational Parties) Comments.

[11] *Id.* at 6-7.

[12] *See generally* WJB-TV Limited Partnership (WJB-TV) Comments; Jackson Comments; Wireless Cable Association International, Inc. (WCA) Comments; and Educational Parties Comments.

[13] Jackson Comments at 2-3; WJB-TV Comments at 11; WCA Comments at 4-6.

[14] NIA Comments at 2-3.

[15] NTIA provides grants to educational institutions for the construction of ITFS facilities.

10. *Discussion* As discussed in the *Notice*, the nature of the ITFS service has changed dramatically over the past decade. Using a window filing system, we would be able to control the flow of applications and eliminate the duplicative processing inherent in the existing procedure. We would no longer have to analyze applications solely to place them on an "A" cut-off list, then process them a second time to consider them on their merits. Currently, each application must undergo a substantive engineering analysis upon filing, simply to allow the release of an "A" cut-off list. No applications are granted or denied in this stage of processing. Subsequently, each application undergoes a second technical analysis in order to determine whether it is grantable. Because each of these analyses requires significant resources, the elimination of the duplicative step would substantially improve processing efficiency. Moreover, a window filing procedure would deny frequency speculators with no intention to construct the opportunity to file against applications on an "A" cut-off list. These benefits would significantly improve the Commission's workflow management.

11. In addition, the record reflects that educators would be able to prepare adequately for each subsequent filing period, due especially but not solely to the significant involvement of wireless cable operators in financing and constructing the facilities. Most of these wireless cable operators have substantial experience in filing for Commission licenses. The record reflects no reason why educators without excess capacity leases will not be able to prepare as before for the financing and construction of an ITFS facility. An ongoing series of filing windows will still ensure an opportunity for such educators to file when they are ready. Indeed, because "A" cut-off lists are not announced in advance or released pursuant to a formal schedule, these educators would be in the same position under the window system as they are now. Consequently, educators that do not rely on excess capacity lessees will not be disadvantaged by the change to a window filing system. For the same reason, the consequences are identical as under the existing system for parties simply not prepared to file during a window.

12. With regard to applicants relying on NTIA funding, we note that NTIA rules require a party seeking a grant to have filed its application with the Commission. Accordingly, in order not to obstruct these grants, we propose allowing each December the tendering of applications that rely upon NTIA funding. We would consider such applications, if filed outside a window period, as having been filed during the immediately following window.

13. Thus, the record in this proceeding suggests that a window filing procedure would increase the efficiency of our processing of applications. Accordingly, we are inclined to adopt it. We also acknowledge the concerns of the commenters that the window filing procedure may not by itself alleviate the problems faced by applicants and the Commission. Specifically, we recognize that it could result in parties' applying for substantially more facilities than they realistically could construct, purposely diverting our resources and delaying the processing of viable applications. Thus, as discussed further below, we seek comment on how we can achieve the significant benefits of a window filing system while minimizing filing practices that impede efficient processing.

PROPOSALS TO IMPROVE THE APPLICATION PROCESS

14. *Financial Qualifications* Some commenters advocate requiring applicants or their proposed wireless cable lessees to submit with their applications proof of their financial ability to construct.[16] They claim that such a requirement would deter a significant number of ITFS speculators. Moreover, they propose requiring separate financial documentation for each station applied for, and making the wireless cable lessee submit the documentation when it is paying for construction of the facilities.[17] In this regard, WCA asserts that the Commission requires a similar demonstration of financial viability in other contexts to deter speculation.[18]

15. We request comment on this proposal. We believe that adoption of this proposal may deter a significant number of speculative applications. However, we recognize that adoption of the proposal would entail significant costs. Compiling the necessary documentation could impose a significant burden on educational institutions, especially those not leasing their excess capacity. Further, any enhanced efficiency might be eviscerated by our having to allocate substantial staff resources to the analysis of each financial submission. In addition, the requirement could become a basis for the filing of frivolous petitions, further delaying the grant of applications. We seek comment on how to balance these costs and benefits. Moreover, we note that wireless cable lessees are not parties to ITFS applications. Thus, we ask commenters to address whether it would be appropriate to require lessees to routinely submit demonstrations of their financial ability. Commenters should also address whether our existing rules and policies on misrepresentation sufficiently prohibit parties from falsely certifying their financial ability to construct.

16. *Application Caps* Next, we turn to two proposals by the Educational Parties to limit the number of certain types of applications that can be filed during a window. First, they propose a cap of three to five applications that an individual nonlocal ITFS entity could file during a window. Such applicants, according to the Educational Parties, often work with frequency speculators and, backed by these wireless cable entities, submit a number of applications simply to bargain with other wireless cable entities seeking to construct a viable wireless cable system.[19]

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[16] Currently, applicants are required to certify their financial ability.

[17] WJB-TV Comments at 9-10; WCA Reply at 3-4. The Educational Parties would restrict the requirement to applicants with excess capacity leases. Educational Parties Reply at 3.

[18] WCA Reply at 4, n.6, citing *e.g.*, Section 90.496 of the Commission's Rules (requiring applicants for a private paging authorization, in certain circumstances, either to place funds equal to the estimated construction cost in an escrow account, or to obtain a performance bond in the same amount).

[19] Educational Parties Comments at 14-15; Educational Parties Reply at 6-7. Citing Section 73.3564(d) of the Commission's Rules, the commenter notes that in low power filing windows, the Commission limits the number of filings by commonly controlled entities.

17. Second, they propose an additional cap of 25 applications associated with the same wireless cable entity, including any entity with direct or indirect common ownership or control. According to the Educational Parties, wireless cable lessees should have to file with their associated ITFS applications information detailing who has any direct or indirect interest in the wireless cable lessee, including any interests as an owner, officer, or director.[20]

18. We invite comments on whether circumstances at this time warrant inquiry into either of the proposed measures. Adoption of either proposal might diminish the number of applications submitted, thereby easing the processing burden substantially. In addition, it would likely limit multiple filings by frequency speculators and their affiliated applicants. However, wireless cable operators require a minimum number of channels with which to operate a viable wireless cable system. Thus, stringent caps could obstruct the rapid development of robust wireless cable systems that can vigorously compete in the rapidly expanding video marketplace. They could also retard the development of ITFS systems, which often obtain funding from the wireless cable lessees. Also, commenters should address how to justify the proposed discrimination against nonlocal applicants. We note that such entities establish eligibility through letters of intended use from an official of each receive site, and through the service on a local programming committee of an official of each receive site. Thus, we invite commenters to address whether and what kinds of limitations would promote both ITFS and wireless cable development. How can we balance the efficiencies of such limitations with the costs they might impose? If an application ceiling would serve the public interest, how many applications associated with one entity should we allow per window? How would we define common control for the purpose of either ITFS or wireless cable? Should we base our definition on actual control, or on attribution of ownership?

19. *Expedited Consideration of Applications* The Educational Parties and WCA propose that, under certain circumstances, we give expedited consideration to ITFS applications in return for the applicant's agreeing to an accelerated construction schedule. WCA seeks to prioritize those applications that, if granted, would most likely become part of an operating wireless cable system. It suggests that the wireless cable lessee be able to request and obtain expedited consideration of an application with which it is associated, if the lessee has access to a certain minimum number of channels in the area.[21] In return, grantees would be required to order their equipment within 21 days of Public Notice of the grant. Moreover, the applicant would agree to construct the facilities within six months. Extensions would be granted only under compelling circumstances, such as the inability of the manufacturer to deliver timely ordered equipment, or accidental damages to essential equipment. WCA claims that adoption of the proposal would accelerate the development of both ITFS and wireless cable systems.[22] In addition, the Educational Parties propose that educators without excess capacity leases also have access to such expedited consideration.[23]

20. While we do not now view the implementation of the proposal as practical, we invite comments on the proposal and how it might be implemented. The staff may have to expend substantial resources determining which applications were eligible for expedited consideration, enforcing the requirement for ordering equipment, and enforcing the construction deadline. These activities could significantly slow the rate of processing and ultimately delay service to the public. Also, would the public be served if we denied an extension request when construction is nearly complete at the end of the six months? Finally, the likely substantial number of applicants requesting expedited consideration could defeat the purpose of the proposal. In the alternative, would processing efficiency be adequately improved by a stricter enforcement of the existing requirements for extensions of time?

21. *Assignment of Construction Permits* We now turn to a related proposal to diminish the incentive of frequency speculators to submit applications for permits that they intend to later assign for profit. We propose to formalize our current practice of limiting the allowable consideration for unbuilt ITFS facilities to out-of-pocket expenses, as is now applied to the sale of broadcast construction permits. We seek comment on the proposal.

22. *Application of the Four-Channel Rule* We next address an issue relating to the four-channel limitation rule. Section 74.902(d) of the Commission's Rules generally limits an ITFS licensee to four channels for use in a single area of operation. However, we have not clearly defined what constitutes an "area of operation" for the purpose of the rule. As a result, educational institutions cannot be certain what channels they can apply for. A clear benchmark would make the standard easier for applicants to comply with and would also increase the speed of processing.

23. In this regard, we note that the staff has considered a single area of operation for this purpose to extend no farther than 20 miles from the transmitter site. We seek comment on whether we should adopt that figure as a rule. Commenters should address whether an educational institution is likely to routinely serve an area extending beyond that radius. Alternatively, should we instead define an area of operation in terms of interference, rather than of distance? Specifically, we seek comment on whether we should consider two sites to be in different areas of operation, as long as one could operate at maximum authorized power on the same channel at each site without co-channel interference.

24. *Offset* We next turn to our policies toward offset.[24] Currently, we apply the 28dB D/U ratio standard to determine co-channel interference. However, we do not require offset if an objection is raised by one of the affected parties. Instead, we have encouraged privately negotiated agree-

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[20] Educational Parties Reply at 7.

[21] WCA proposes expedited consideration only if the wireless cable lessee already has 12 channels, at least 4 of which are MDS. This would include licensed access to MDS or ITFS stations, cut-off non-mutually exclusive proposed MDS facilities, and/or proposed ITFS stations (including the ones at issue). WCA Comments at 7.

[22] *Id.* at 7-8; WCA Reply at 6-7.

[23] Educational Parties Comments at 5.

[24] A licensee utilizing offset operates at a frequency either slightly higher or slightly lower than the standard frequency for that channel. Specifically, such a licensee operates its facilities with a carrier frequency 10 kHz from the nominal carrier frequency.

ments to use offset to resolve interference.[25] Consequently, we must decide between two mutually exclusive applications when, if the applicants used offset, both could serve the public without objectionable co-channel interference. Unlike broadcast services, ITFS is a direct, point-to-point service that is designed to maximize the number of educational entities that can avail themselves of this service. To require offset between otherwise grantable mutually exclusive ITFS applicants would further this goal. Thus, we propose requiring the use of offset in such circumstances when all affected transmitters are capable of handling frequency offset stability requirements. Such a requirement, we believe, would both accelerate the granting of applications and allow for a greater number of ITFS licensees, thereby increasing service to the public. Also, although we currently require new applicants to use equipment capable of utilizing offset, we have not always done so. Accordingly, we would not apply the proposed rule to facilities predating the requirement that lack offset capability.

25. *Protected Service Areas* We shall also take the opportunity to refine our rules on protected service areas for the wireless cable lessee.[26] In addition to receive site protection, ITFS applicants can request interference protection for a service area. We provide such protection only at an applicant or licensee's request. Generally, such protection benefits the wireless cable lessee, because the protected service area ensures interference protection within an area where receive sites are not specified, or extended protection over an area where receive sites are not currently located. Moreover, the protection is afforded only during the hours that the wireless cable entity is using the channels.

26. When we adopted the rule authorizing protected service areas, we intended to provide a measure of protection to wireless cable lessees, in order to promote the inauguration of new or improved wireless cable service.[27] However, the protected service area has frequently been used in ways that we had not previously contemplated, which impede new and improved service. Specifically, applicants for new facilities often request and receive interference protection that restricts an existing licensee from seeking certain modifications to its facilities. In addition, otherwise grantable ITFS applications in adjacent communities often obtain interference protection, causing them to become mutually exclusive with a previously filed application. At the same time, an existing facility that has not requested such protection often, upon learning that an application for a nearby operation has been filed, requests interference protection and thereby obstructs the new applicant. We believe that these practices may be an abuse of our processing system driven by certain wireless cable lessees, designed to prevent or dilute competition. Further, this practice significantly impacts our processing and delays the inauguration of new or improved service to the public. Moreover, such practices unfairly disrupt existing operations and already-proposed facilities.

27. We believe that the public interest would not be served if a new applicant's request for a protected service area were made merely to obstruct a pending modification request of a licensed ITFS facility. We also believe that the public is similarly disserved when such protection delays or prevents altogether the authorization of otherwise grantable applications. In order to hasten service to the public, then, we propose to modify our application of interference protection. Specifically, we propose to apply such protection only prospectively. Thus, it would be effective only with regard to applications filed after the protection request. We believe that this would promote the original policies behind interference protection. Commenters are invited to address whether our proposal would sufficiently diminish the disruption and delay resulting from the current method of granting interference protection.

28. We also seek comment on a particular application of the proposed rule. Specifically, if two applications submitted during the same filing window, otherwise grantable, are mutually exclusive only because both applicants request a protected service area, we propose to consider them as mutually exclusive. We invite comments on this proposal.

29. *Receive-Site Interference Protection* Next, we address interference protection for receive sites. Pursuant to Sections 74.903(d) and (e) of the Commission's Rules, an ITFS licensee, permittee, or applicant may request interference protection for its receive sites. Currently, the rule does not expressly limit the distance a receive site may be from the transmitter in order to receive such protection. As a result, we have received numerous applications in which interference protection has been requested for receive sites that appear to be beyond the reasonable coverage ability of an educational institution. We believe that requests for interference protection for receive sites outside the applicant's coverage ability are an abuse of our processes, designed to increase artificially the service area of the wireless cable lessee. We also believe that the elimination of this practice would significantly increase the efficiency of our processing of applications, thereby hastening service to the public.

30. Given an ITFS facility's height, power, frequency, and mode of transmission, our experience suggests that it is generally unlikely that an educational institution would reasonably serve a receive site that is more than 35 miles from the transmitter. Thus, absent a showing of unique circumstances, we propose to provide protection only for those receive sites 35 miles or less from the transmitter. Further, we propose that an applicant not be able to claim eligibility for a license by use of any receive site more than 35 miles from the transmitter. Applicants are invited to address this proposal.

31. *Major Modifications* We now turn to applications to modify an existing ITFS facility or to amend a pending application. Currently, we classify such applications and amendments as either major or minor, attaching different procedural rules to each.[28] We generally define major modifications as those that significantly impact an existing or proposed facility. Pursuant to the window proposal, the Commission will accept major amendments and applications for major modifications only during an open window period. As we stated in the *Notice*, we believe that such a rule will enhance processing efficiency.

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[25] *See, e.g., Second Report and Order* at 91-92.
[26] Sections 74.903(d) and (e) of the Commission's Rules.
[27] *Wireless Cable Reconsideration* at 6765-67.
[28] Section 74.911 of the Commission's Rules, 47 C.F.R. Sec. 74.911.

32. However, the current definition of minor changes, we believe, does not realistically take into account the impact that the proposed change would have on the facility in question, nearby facilities, or proposed facilities.[29] Applicants frequently submit applications for changes that would substantially affect the operations of such facilities, yet we now treat many of these changes as minor. Accordingly, we propose to reclassify certain changes as major. Consequently, we would accept amendments and applications for such changes only during a window filing period. We believe that this action would more accurately reflect the impact of a proposed change.

33. We have had an informal policy of considering proposals to relocate a facility's transmitter site by 10 miles or more as a major change. We now propose to modify our rules to make this policy formal. In addition, we propose to reclassify as a major change any application or amendment involving: (1) any polarization change; (2) the addition of any receive site that would experience interference from any licensee or applicant on file prior to the submission of the amendment; (3) an increase in the EIRP in any direction by more than 1.5 dB;[30] (4) an increase of 25 feet or more in the transmitting antenna height; or (5) any change that would cause interference to any previously proposed application or existing facility. We note that by limiting the opportunity to file the above types of applications, adoption of the proposal would appear to somewhat diminish a licensee or applicant's flexibility to respond to changing needs and circumstances. At the same time, however, we believe that adoption of the proposed rules would make our classification of changes more consistent. By doing so, we believe, we would enhance the efficiency of the window filing system. Thus, it appears that the benefits gained from the rule would outweigh the costs. We seek comment on our analysis. Finally, we propose to exempt from the new rule any change that resolves mutually exclusive applications without creating new frequency conflicts.[31]

34. *FAA Authorization* Next, we address the interaction between our rules and those of the Federal Aviation Administration (FAA). Pursuant to Section 17.4 of the Commission's Rules, we do not grant or modify a license until the FAA has determined that the proposed transmitter site will not pose a hazard to air navigation. Under our current rules, applicants state in their applications that they have applied for FAA clearance. However, once that clearance is obtained, applicants are not required to inform the Commission. We seek to hasten the time that our staff learns of the FAA's hazard determinations. Accordingly, we propose to require the applicant to inform the Commission of the FAA's determination. We believe that this proposed change would accelerate service to the public. Commenters are invited to address the costs and benefits of adopting the proposal.

35. *Interference Studies* We now turn to another matter involving applicants' submissions to the Commission. Applicants often claim that their proposed facilities will cause no harmful interference, based either on their being beyond the radio horizon or on their signal being blocked by nearby terrain. However, such applicants frequently provide no terrain profiles to support such claims. Furthermore, whenever an applicant files a proposal claiming that no interference will be caused due to the signal's being blocked by the surrounding terrain, a question almost always arises as to the amount of signal that will be blocked. Many applicants conclude that any terrain obstruction, regardless of degree, completely blocks the signal. Our experience has demonstrated that this conclusion is not necessarily true.

36. Accordingly, we propose to amend the rules to require the submission of terrain profiles and a quantitative analysis of any additional signal loss calculated by using the Longley-Rice propagation model, Version 1.2.2, in the point-to-point mode.[32] Adoption of the proposal would make mandatory a technical analysis that many applicants already use. The Longley-Rice model was derived from NBS Technical Note 101[33] and updated in 1982 by G. A. Hufford.[34] Version 1.2.2 incorporated modifications described in a memorandum by Hufford[35] in 1985. Terrain elevations used as input to the model should be from the United States Geological Survey three-second or 30-second digitized terrain databases. Further, we propose to disregard any claim of signal blockage caused by artificial structures. Such claims usually make impossible any quantitative analysis. Accordingly, we seek comment on these proposals.

37. *Reasonable Assurance of Receive Sites* We have received a number of applications in which some of the schools listed as receive sites have subsequently informed us that they had, in fact, not agreed to participate in the proposed ITFS system. This practice forces the Commission to allocate its scarce resources processing an inaccurate application, then reprocessing it (and related mutually exclusive applications) when the information is corrected. Such duplicative processing significantly delays the final disposition of all ITFS applications.

38. Therefore, we seek comment on how an applicant should demonstrate reasonable assurance of a receive site's legitimacy. We propose requiring a letter of assurance from the applicant, listing the receive sites' contact people, titles, and telephone numbers. With regard to noncompliance with any new requirement, should we automatically decline to consider any proposed receive site without adequate assurance?

39. *Accreditation of Applicants* We now turn to the accreditation of ITFS applicants. Currently, pursuant to Section 74.932 of the Commission's Rules, an applicant to construct new facilities must report whether it, its mem-

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[29] Section 74.911 classifies a small number of specified changes as major and defines all other changes as minor.

[30] Thus, TPO would no longer be the deciding factor in determining whether a change is major.

[31] See paragraph 5. In addition, Section 22.23(g)(2) of the Commission's Rules has a similar exception for the resolution of mutually exclusive applications in the Public Mobile Service.

[32] Longley, A. G. and P. L. Rice, "Prediction of Tropospheric Radio Transmission Loss Over Irregular Terrain: A Computer Method," ESSA Technical Report ERL 79-ITS 67, Institute for Telecommunications Sciences, July, 1968.

[33] Rice, P. L., A. G. Longley, K. A. Norton, and A. P. Barris, "Transmission Loss Predictions for Tropospheric Communications Circuits," NBS Technical Note 101 (Revised), vol. I-II, U.S. Department of Commerce, 1967.

[34] Hufford, G. A., A. G. Longley, and W. A. Kissick, "A Guide to the Use of the ITS Irregular Terrain Model in the Area Prediction Mode," NTIA Report 82-100, U.S. Department of Commerce, April, 1982.

[35] Hufford, G. A., Memorandum to Users of the ITS Irregular Terrain Model, Institute for Telecommunications Sciences, U.S. Department of Commerce, January 30, 1985.

bers, or the receive sites it serves are accredited.[36] The application form does not require the educator to specify whether it is the applicant or its members that are accredited. This ambiguity has opened the door to abuse of our procedures. Consequently, we have received applications in which the applicant is an accredited organization, but it proposes receive sites at non-accredited institutions. Applicants often evade the intent of the rule by having only one receive site out of many accredited, thereby defeating the fundamental purpose of the service, which is to serve the educational needs of accredited institutions.

40. Accordingly, we seek comment on how we can curb this abuse of the service. We propose to require applicants to state whether and by whom each school listed as a receive site is accredited. We also propose not to consider in a tie-breaking proceeding a receive site that lacks this accompanying information, or that is unaccredited, as that would allow it unwarranted comparative consideration. Commenters are invited to address other ways we should utilize the additional information. Should we require a majority of receive sites to be accredited in order for the application to be grantable? Should we deny interference protection for any unaccredited receive site?

41. We invite commenters to address any or all of the above proposals. However, we do not wish to limit the range of comments in this area. Thus, we welcome other proposals besides those discussed above that would safeguard both the efficiency of a window filing system and the integrity of our processes.

FREEZE ON NEW APPLICATIONS

42. In the *Notice* we announced that, for a period of time, we would not accept applications for new ITFS facilities or for major changes to existing facilities. We expressed our concern that potential applicants, in order to apply for a license or a major change before the possible adoption of a filing window rule, would inundate the Commission with applications while the "A" and "B" cut-off rule was still in effect, thereby defeating the purpose of the proposed rulemaking. However, we stated that we would continue to accept (but not process) applications in which the applicant relies on NTIA for construction funds. We have also continued to accept major change proposals where they are filed in the same market to accommodate settlement agreements among applicants that have previously achieved cut-off status and where the settlement resolves mutually exclusive applications.

43. We believe that the public interest would be served by a modification of the freeze. Specifically, upon publication of this *Order and Further Notice* in the *Federal Register*, we shall instruct the staff to begin accepting applications for major changes to existing facilities, and any mutually exclusive applications thereto. Such applications will be processed under the existing A/B cut-off rules. We believe that this will ease the burden that the freeze has caused to educational institutions that seek to alter their existing facilities. Licensees and those filing competing applications may file such applications until the effective date of any window filing rules.[37] We note that this *Order and Further Notice* contemplates modifying our definition of a major change. For the purposes of modifying the freeze, we shall use the existing definition of the term. Any pending major modification application not cut off as of the adoption date of this *Order and Further Notice* will be considered in conjunction with the newly submitted applications.

ADMINISTRATIVE MATTERS

A. Regulatory Flexibility Analyses

44. The Commission's initial regulatory analysis for this *Order and Further Notice of Proposed Rulemaking* is set forth in Appendix B.

B. Ordering Clauses

45. IT IS ORDERED that this *Order and Further Notice of Proposed Rulemaking* IS ADOPTED.

46. IT IS FURTHER ORDERED that, upon publication of this *Order and Further Notice of Proposed Rulemaking* in the *Federal Register*,[38] applications for major changes to existing ITFS facilities will be accepted for filing by the Federal Communications Commission. Such applications will be processed pursuant to existing rules.

47. IT IS FURTHER ORDERED, that the petition to modify the freeze submitted by American Telecasting, Inc. IS DISMISSED AS MOOT.

C. Additional Information

48. For additional information on this proceeding, contact Paul R. Gordon, Mass Media Bureau, (202) 418-1630.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[36] Form 330, Section II, Question 3.

[37] American Telecasting, Inc. (ATI), a wireless cable entity, has submitted a petition to modify the freeze. Our decision here modifies the freeze on a broader scale than requested by ATI. Therefore, we dismiss ATI's petition as moot.

[38] Because the partial lifting of the freeze grants an exemption and relieves a restriction, the 30-day *Federal Register* publication requirement does not apply. *See* 5 U.S.C. Sec. 553(d)(1).

APPENDIX A

A. List of Commenters

COMMENTS

American Council on Education, American Association of Community Colleges, Arizona Board of Regents for Benefit of the University of Arizona, Association for Higher Education, California State University - Sacramento, Iowa Public Broadcasting Board, South Carolina Educational Television Commission, State of Wisconsin - Educational Communications Board, St. Louis Regional Educational and Public Television Commission, University of Maine System, University of Wisconsin System, and University System of the Ana G. Mendez

Educational Foundation

Paul Jackson Enterprises

National ITFS Association

RuralVision South, Inc. and RuralVision Central, Inc.

Wireless Cable Association International, Inc.

WJB-TV Limited Partnership

REPLY COMMENTS

American Council on Education, American Association of Community Colleges, Arizona Board of Regents for Benefit of the University of Arizona, Association for Higher Education, California State University - Sacramento, Iowa Public Broadcasting Board, South Carolina Educational Television Commission, State of Wisconsin - Educational Communications Board, St. Louis Regional Educational and Public Television Commission, University of Maine System, University of Wisconsin System, and University System of the Ana G. Mendez

Educational Foundation

Wireless Cable Association International, Inc.

B. Ex Parte

This is a nonrestricted notice and comment rulemaking proceeding. *Ex Parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission Rules. *See generally*, 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

C. Comment Dates

Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before **August 29, 1994**, and reply comments on or before **September 28, 1994**. To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, room 239, at the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554.

APPENDIX B

Initial Regulatory Flexibility Analysis

Reason for the Action: This proceeding was initiated to review and update the procedures which govern the filing of applications for new ITFS channels.

Objective of this Action: The actions proposed in this *Further Notice* are intended to improve ITFS and wireless cable service by making the regulations that govern applying for a new ITFS channel consistent with the continuing evolution of the telecommunications industry.

Legal Basis: Authority for the actions proposed in this *Further Notice* may be found in Sections 1, 4(i) and (j), 303, 308, 309, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 303, 308, 309, and 403.

Number and Type of Small Entities Affected by the Proposed Rule: Approximately 1,200 existing and potential wireless cable and ITFS operators, the majority of which are small, would be affected by the proposals contained in this *Further Notice*.

Reporting, Recordkeeping, and Other Compliance Requirements Inherent in the Proposed Rule: The proposals suggested in this *Further Notice* are designed to prevent abuses of our filing system. Adoption of the proposals would impose little to no regulatory burden on most educational institutions.

Federal Rules which Overlap, Duplicate, or Conflict with the Proposed Rule: None.

Any Significant Alternative Minimizing Impact on Small Entities and Consistent with the Stated Objective of the Action: The proposals contained in this *Further Notice* are meant to make the regulations that govern applying for a new ITFS channel consistent with the continuing evolution of the telecommunications industry.

As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposal suggested in this document. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall send a copy of the Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.*, (1981)).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE Telecom Incorporated — File Nos. I-T-C-94-237, I-T-C-94-357-TC

Application for Authority Pursuant to Section 214 of the Communications Act, As Amended, and Section 63.01 of the Commission's Rules and Regulations, to Lease Terrestrial Facilities for Two-Way Service to Canada and Pro Forma Assignment of Authorization

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: June 29, 1994; Released: July 15, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested applications filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require the resale of international private lines for the provision of non-interconnected private line services between the United States and Canada to the general public by GTE Telecom Incorporated (GTE).[1]

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-94-237 and I-T-C-94-357-TC ARE GRANTED and GTE Spacenet's interest in File No. I-T-C-94-237 is assigned to GTE, and GTE is authorized to resell international private lines not interconnected to the public switched network for the provision of international private line voice and data services[2] between the United States and Canada.[3]

3. IT IS FURTHER ORDERED that GTE is authorized to lease and operate a one-half interest in up to five T-1 circuits from MCI, pursuant to the applicable tariff,[4] for the provision of its international non-interconnected private line services between the United States and Canada.

4. IT IS FURTHER ORDERED that neither GTE nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession contract, understanding, or working arrangement to which GTE or any such persons or companies controlling or controlled by GTE are parties.

5. IT IS FURTHER ORDERED that GTE shall file publicly tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. § 203, and Part 61 of the Commission's rules, 47 C.F.R. Part 61, for the services authorized herein.

6. IT IS FURTHER ORDERED that GTE shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's rules, 47 C.F.R. § 43.61.

7. IT IS FURTHER ORDERED that GTE shall file with the Commission copies of any operating agreements entered into with its foreign correspondents within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's rules, 47 C.F.R. § 43.51.

8. IT IS FURTHER ORDERED that GTE shall file semi-annual reports of circuit additions, to the certified point, pursuant to Section 63.15(b) of the Commission's rules, for private lines leased for the provision of non-interconnected private line services.

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[1] GTE initially requested authority to provide these services in File No. I-T-C-94-237 under a different corporate entity, GTE Spacenet Corporation (GTE Spacenet). GTE and GTE Spacenet are both wholly-owned subsidiaries of GTE Corporation. On June 16, 1994, GTE filed an application (File No. I-T-C-94-357-TC) for a pro forma transfer of this application for facilities from GTE Spacenet to GTE.

[2] The Commission has concluded that the public interest in cost-based international telecommunications services would be served by the encouragement of international resale, provided that steps were taken to ensure that such resale did not exasperate the settlements deficit. The Commission, therefore, conditioned its resale policy by requiring U.S. carriers to permit resale of their international private lines only to those countries which afford equivalent resale opportunities. *See Regulation of International Accounting Rates, CC Docket 90-337, Phase II Report and Order,* 7 FCC Rcd 559 (1992). Subsequently, the Commission stated that the resale of international private lines for the provision of international private line services, as opposed to switched services, does not implicate the settlements process to the extent such lines are used only to carry non-switched traffic that is not subject to the international settlements process, and thus clarified that the equivalency requirement does not apply to the resale of international private lines for private line services. Nevertheless, the Commission confirmed the right of an end user to interconnect its international private lines to the public switched network, through, for example, its own private branch exchange. *See Regulation of International Accounting Rates, CC Docket 90-337, Phase II Order on Reconsideration and Third Further Notice of Proposed Rulemaking,* 7 FCC Rcd 7927 (1992) (*"Phase II Third Further Notice"*) .

[3] We note that GTE intends to provide the services authorized herein from the United States to Canada only. *See* Letter dated May 24, 1994, from Shelia A. Mellody, GTE, to George S. Li, Chief, International Facilities Division, Common Carrier Bureau. We further note that should GTE obtain any interest in facilities beyond the authorized international point for providing common carrier services, including private line service between the United States and other international points, such action would constitute an extension of lines under Section 214 of the Communications Act. Therefore, under the provisions of the Commission's *International Competitive Carrier Policies,* 102 FCC 2d 812 (1985), *recon. denied* 60 R.R. 2d 1435 (1986), it would be necessary for GTE to file an additional application for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

[4] MCI Tariff No. 1.7

9. IT IS FURTHER ORDERED that this Order may be subject to future modification pursuant to the outcome of the *Phase II Third Further Notice* and any related proceedings.

10. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services GTE seeks authority to provide. The transmission of money is not considered to be a common carrier service.

11. IT IS FURTHER ORDERED that our authorization of the applicant to provide private lines is limited to the provision of such private lines only between the United States and Canada -- that is, private lines which originate in the United States and terminate in Canada, or which originate in Canada and terminate in the United States. In addition, the applicant may not -- and the applicant's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the United States or the foreign end, or both, for the provision of international basic communications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the foreign administration affords resale opportunities equivalent to those available under United States law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending.*

12. This Order is issued under Section 0.291 of the Commission's rules, and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the public notice of this Order. (*See* 47 C.F.R. § 1.4(b)(2).)

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-56

In the Matter of

Amendment of Section 73.202(b), RM-8459
Table of Allotments,
FM Broadcast Stations.
(Borger, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 7, 1994; Released: July 15, 1994

Comment Date: September 6, 1994
Reply Comment Date: September 21, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Zia Broadcasting Company ("petitioner"), licensee of Station KQTY-AM, Borger, Texas, requesting the allotment of Channel 294A to Borger, Texas, as the community's second local FM service.[1]

2. We believe the public interest would be served by proposing the allotment of Channel 294A to Borger since it could provide the community with its second local FM service. Channel 294A can be allotted to Borger in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Borger, Texas	282C1	282C1, 294A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **September 6, 1994**, and reply comments on or before **September 21, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Timothy C. Cutforth, P.E.
Vir James P.C.
Broadcast Engineering Consultants
965 S. Irving Street
Denver, Colorado 80219
(Consultant for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202)634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] Although petitioner's request indicates that the original copy of its proposal was signed by a consultant, petitioner failed to include an affidavit verifying that the statements contained in its petition were accurate to the best of its knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.401(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Section 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, n.41 (1990). Petitioner is requested to rectify this omission in its comments.

[2] The coordinates for Channel 294A at Borger are North Latitude 35-39-24 and West Longitude 101-23-36.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-106

In re

Amendment of Part 74 of the
Commission's Rules Governing Use
of the Frequencies in the
Instructional Television Fixed Service

REPORT AND ORDER

Adopted: June 9, 1994; Released: July 6, 1994

By the Commission: Commissioner Quello issuing a statement.

1. On April 26, 1993, the Commission released a *Notice of Proposed Rule Making*, 8 F.C.C. Rcd 2828 (1993), which proposed to permit Instructional Television Fixed Service (ITFS) licensees to shift, or "channel load," the requisite ITFS programming of 20 hours per channel per week to as few as one channel. The dual objectives of the *Notice* were to insure full spectrum utilization, by freeing up channels for licensee leasing to "wireless cable"[1] operators, while preserving the primary purpose of ITFS. During the extended reply comment period, the Wireless Cable Association (WCA), submitted an industry-wide channel loading compromise agreement it had entered into with numerous educators. We have reviewed the comments and the compromise proposal in this proceeding and believe that a revision of our rules and policies to permit channel loading is warranted, until we consider digital compression's impact on the ITFS service in a future notice and comment proceeding.

BACKGROUND

2. The *Notice* emanated from a July 23, 1992 *Public Notice* issued by the Commission in response to the submission by four ITFS permittees of revised programming schedules and accompanying requests for waiver of certain of our programming rules.[2] Specifically, each of the permittees, authorized to operate four channels at Spokane, Washington, proposed to "channel load," that is, to move all of their minimum ITFS program requirements of 20 hours per channel per week, for a total of 80 hours per week, onto one of its four channels so that each could lease its remaining three channels on a 24-hour basis to a wireless cable operator. Because their proposals conflicted with our minimum programming requirements for licensees leasing excess capacity, the permittees simultaneously requested waiver of Sections 74.931(a) and (e)(2) of the Commission's Rules. Section 74.931(a) provides that every authorized channel "must be used to transmit formal educational programming offered for credit to enrolled students of accredited schools." And Section 74.931(e)(2) requires that an ITFS licensee leasing its excess capacity to a wireless cable operator provide at least 20 hours per channel per week of ITFS programming and reserve an additional 20 hours of "recapture" time per channel per week, subject to one year's advance written notification. The *Public Notice* sought comment on the question of whether the permittees' waiver requests would best be addressed in a waiver or a rule making proceeding. Determining that the proper avenue for addressing the fundamental regulatory concerns implicated by the waiver requests was by rule making, the Commission initiated the *Notice* to solicit further comment on its minimum ITFS programming requirements.

3. At the outset, the *Notice* explained the Commission's aims in sanctioning, in 1991, *see Wireless Cable Order Recon.*, 6 F.C.C. Rcd 6764 (1991), the use of "channel mapping," a technology which enables a wireless cable lessee to free up as many as three channels in a four-channel ITFS system for full-time commercial programming. 8 F.C.C. Rcd at 2831.[3] Those objectives were to allow a less disruptive scheduling of instructional and commercial uses of ITFS channels to the benefit of both educational institutions and wireless cable operators. 8 F.C.C. Rcd at 2831. What the Commission did not intend, however, was a revision or elimination of the ITFS rules governing minimum instructional use, Section 74.931, or of the demonstration of need for the number of channels requested, Section 74.902. *Id.* Nor did the Commission envision that channel mapping technology would be employed to divert all instructional programming to as few as one channel. *Id.* Nevertheless, the *Notice* proposed a relaxation of the per channel minimum use requirements so that ITFS applicants could request up to four channels, provided they proposed a minimum of 80 hours of instructional programming, regardless of the distribution of that programming via channel mapping. *Id.* Based upon this less restrictive proposal for those ITFS applicants uti-

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[1] "Wireless cable" is a term used to describe Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS), which utilize over-the-air microwave radio channels rather than coaxial or fiber optic cable to deliver video material to subscribers. There are 12 or 13 channels available to wireless cable for full-time use: 11 MMDS channels, E1-E4, F1-F4, and H1-H3; two single-channel MDS channels available in 50 cities; and one single-channel MDS channel in the rest of the country. In addition, wireless cable has access to the 20 ITFS channels, A1-A4, B1-B4, C1-C4, D1-D4, and G1-G4, on a leased, part-time basis, as well as to that portion of the spectrum, under certain conditions, if ITFS channels are vacant. *See Second Wireless Cable Order*, 6 F.C.C. Rcd 6792, 6801-06 (1991). We do not intend to suggest by our use of the term "wireless cable" that it constitutes "cable" service for statutory or regulatory purposes.

[2] The ITFS licensees were North American Catholic Educational Programming Foundation, Inc., Spokane Community College, Spokane Falls Community College, and Gonzaga University Telecommunications Association. MMB Files 920219A, 920220A, 920220B, and 920224A.

[3] It does so by transmitting a staggered schedule of ITFS programming over each of the four channels and converting it, via set-top box, into uninterrupted service to student-viewers on fewer than the four channels in an authorized channel group.

lizing costly channel mapping technology,[4] the Commission reasoned that it would be unjustifiable to prohibit the use of cost-free channel loading in that each approach is a means to the same end: making channels available on a full-time basis for leasing to wireless cable operators. *Id.* "The policy debate at issue here is not the mechanism by which ITFS channel time is made available to wireless cable operators," the *Notice* stated, "but how we can preserve the primary purpose of ITFS in light of our proposals here."

4. In proposing the temporary shifting of ITFS programming to fewer than four channels in an authorized channel group, the overarching objectives of the *Notice* were to meet the asserted demand of wireless cable operators for additional channels while insuring the integrity of the ITFS spectrum. 8 F.C.C. Rcd at 2832. Accordingly, the *Notice* queried the need in a channel loading scheme for mechanisms to safeguard what has been the primary purpose of ITFS since its inception in 1963: the transmission of instructional material to accredited public and private schools, colleges and universities for the formal education of students. 8 F.C.C. Rcd at 2828. To that end, the *Notice* proposed general measures for preserving the primary purpose of ITFS, seeking specific responses to the following: (1) the maximum number of channels to be freed up for full-time commercial use; (2) whether the required ITFS programming must be scheduled during specific times of the day; (3) how many of the non-loaded channels should be subject to recapture by the licensee; (4) the benefits of awarding a comparative advantage in mutually exclusive cases to applicants refraining from the use of channel loading; (5) the imposition of a heightened demonstration of *bona fide* educational intent from those proposing to channel load; and (6) any other potential protective restrictions. *Notice*, 8 F.C.C. Rcd at 2832. Additionally, the *Notice* proposed to permit channel loading on a temporary basis, reasoning that within three to five years digital compression would become a viable alternative for generating additional channel capacity.[5] Finally, the *Notice* urged commenters to address, in light of the channel loading proposal, Section 74.902(d). That rule provides that applicants not apply for more channels than they intend to construct within a reasonable time, that channels be authorized to applicants based on the "demonstration of need," and that a licensee is limited to the assignment of no more than four channels in a single area of operation.

COMMENTS

5. Commenters[6] were evenly split in their support for, and opposition to, the channel loading proposal. While all parties objecting to the interim proposal are composed of educators, those favoring channel loading comprise both wireless cable operators and educators, most of which are involved in excess capacity leasing arrangements. Channel loading supporters insisted that the interim proposal would not constitute *de facto* reallocation of the spectrum because it would be a permissive practice, not one ordered by the Commission, and one in which the ITFS licensee could engage, in its sole discretion. Wireless cable operator WJB-TV Limited Partnership (WJB-TV) argued that ITFS licensees' fears of direct licensure of ITFS channels to MMDS were unwarranted in that wireless operators rely on their partnerships with local educational institutions as a source of goodwill and positive public relations. However, WJB-TV, Transworld Telecommunications, Inc. (Transworld), and the Wireless Cable Association International, Inc. (WCA), which are, or represent, wireless cable operators, separately asserted that a Commission-mandated licensee right to ready recapture of all four group channels for simultaneous transmission of ITFS programming would "undercut" the goals channel loading attempts to advance. So long as licensees can assert that right, the operators will be compelled to either install channel mapping technology as a backup device or to refrain entirely from entering into lease agreements with ITFS entities. Rather than establish simultaneous recapture as a compulsory right, WJB-TV and WCA suggested, the Commission should leave that matter as a lease agreement negotiating point between the ITFS licensee and wireless cable operator, affording the ITFS licensee the freedom to contract for its 80 hours of weekly recapture time on one, two, three or all four channels.

6. Numerous educators disagreed, viewing the issue of ready recapture as inseparable from that of *de facto* reallocation of the ITFS spectrum. North American Catholic Educational Programming Foundation, Inc. (NACEPF), one of the four permittees originally seeking waiver of the programming rules, and ITFS Parties, comprising largely college and university systems and state educational television agencies which provisionally favor channel loading,[7] separately emphasized that any channel-shifting scheme include the non-negotiable right to recapture all four ITFS channels upon reasonable notice to the wireless operator, with no ensuing contractual cost or penalty to the educator. National ITFS Association (NIA), which represents more than 60 educators in 26 states, concurred, stating that

[4] The cost of a channel-mapping switch alone, according to one commenter in the *Notice* proceeding, is $115,000, in addition to $100,000 for time-base correction equipment, $700 per month for increased space, power and environmental controls associated with the switching equipment, and $150 for each set-top converter to be installed on every subscriber's and receive site's television sets. 8 F.C.C. Rcd at 2830. Other drawbacks to the technology include the impossibilities of viewing one channel while recording another on a video cassette recorder, of consecutively taping programs on separate channels, and of utilizing the "picture-in-picture" feature of newer television and video cassette recorders without the aid of additional equipment. *Id.* at 2830, n.9.

[5] Implementation of this technology may make it possible for the licensee of an analog four-channel ITFS station to simultaneously transmit at least 16 digitally "compressed" video programs over the station's 24 MHz of spectrum.

[6] A list of the parties filing comments and replies is provided in Appendix A, with abbreviated descriptions of associations and joint parties.

[7] ITFS Parties is composed of: American Council on Education, American Association of Community Colleges, Alliance for Higher Education, Arizona Board of Regents for Benefit of the University of Arizona, Board of Regents of the University of Wisconsin System, Iowa Public Broadcasting Board, Regents of the University of New Mexico and Board of Education of the City of Albuquerque, South Carolina Educational Television Commission, State of Wisconsin - Educational Communications Board, and University of Maine System.

without "this fundamental concept," up to 75 percent of the ITFS spectrum would be ceded to wireless cable. Trans Video Communications, Inc., an ITFS licensee in Brooklyn, and the Trustees of Leland Stanford Junior University, an ITFS licensee in San Francisco (jointly, TVC/Stanford), echoed that assessment, arguing that channel loading employed in the extreme would result in as many as three channels of an individual ITFS licensee, and as many as 15 of 20 ITFS channels in a market, failing to comply with the primary purpose of ITFS, the transmission of formal education. To transmit the 80 requisite hours of ITFS programming per week over one channel, TVC/Stanford observed, would require a 16-hour programming day, Monday through Friday. Such a schedule, according to TVC/Stanford, as well as the University of Maryland, means that the channel-loading licensee is either serving students during the evening hours, an acceptable use of the ITFS spectrum, or, more likely, is recording the programs at night for daytime playback, an inefficient use of authorized channel capacity. In sum, TVC/Stanford contended, not only does the Commission's channel-loading proposal constitute a reallocation of spectrum, but it violates the Communications Act as much now as it did less than three years ago, when the Commission, in *Wireless Cable Order*, 5 F.C.C. Rcd 6410, 6416 (1991), rejected it on those very bases.

7. As for the continued validity of Section 74.902(d) in the context of a channel-loading scheme, Rural Wireless Cable Group (Rural Wireless Group), whose *ad hoc* membership includes five wireless cable companies, suggested that because a licensee with fewer than four channels is an "unattractive partner," the Commission should alter the demonstration-of-need portion of Section 74.902(d) so that an applicant's need is "presumptively" provided where it proposes to lease excess capacity to a wireless operator. While national licensee Hispanic Information and Telecommunications Network, Inc. (HITN) would advocate relaxing the demonstration of need, it "vehemently" opposed applying Rural Wireless Group's presumption to the four-channel-limitation portion of the rule. To do so, HITN contended, would encourage the wholesale licensing and warehousing of channels by commercial operators, foreclosing educators from utilizing the ITFS spectrum.

8. Finally, those opposing channel loading, and even several supporting it, indicated that instituting certain safeguards might render that practice acceptable to both educators and wireless operators, while protecting the primary purpose of the spectrum. The following are summaries of commenters' positions on safeguards proposed by the Commission in the *Notice:*

Number of channels for commercial use. Commenters favoring channel loading, such as Rural Wireless Group and the University of California suggested that wireless operators and ITFS entities should mutually determine the number of channels to be used for full-time commercial programming. In contrast, the Board of Cooperative Educational Services of Nassau County, New York (Nassau County), which opposes channel loading, urged that any channel-loading scheme be limited to 50 percent of the authorized channels, while TVC/Stanford asserted that only one channel be permitted to be leased on a 24-hour basis.

Time-of-day restrictions. Three parties favoring channel loading noted their opposition to the scheduling of ITFS programming on the loaded channels during specific times of the day, particularly between the hours of 8:00 a.m. and 10:00 p.m., Monday through Saturday, as proposed in the *Notice*. WCA and Transworld argued that most licensees will "invariably" schedule their requisite ITFS programming during those hours and that imposition of time-of-day restrictions would be inconsistent with the Commission's recent elimination, in *Wireless Cable Order Recon.*, 6 F.C.C. Rcd at 6774, of such strictures. Parkland College, which caters to parents and other working adults pursuing degrees or educational enrichment in central Illinois, also rejected scheduling restraints. Conversely, Nassau County advocated that all educational programming be scheduled between 8:00 a.m. and 4:00 p.m., Monday through Saturday, and TVC/Stanford asserted that accommodation of a "typical" school's needs necessitates that all ITFS programming must be transmitted between 8:00 a.m. and 5:00 p.m., Monday through Friday.

Comparative advantage to applicants not channel loading. Commenters favoring channel loading and addressing this proposed safeguard objected to penalizing applicants which, they claimed, should instead be rewarded for both providing the requisite amount of ITFS programming and enabling wireless cable to better compete in the video marketplace. Moreover, they noted, under Section 74.913(b)(4), the Commission already bestows a preference upon applicants proposing to use substantially all of their airtime for formal educational and/or ITFS programming. TVC/Stanford, which objects to channel loading, endorsed the awarding of one merit point for each channel offering a daily minimum of five hours of ITFS programming. This comparative preference, TVC/Leland asserted, would promote use of the ITFS spectrum for instructional purposes and deter speculative applications.

Heightened demonstration of educational intent. Transworld assailed the need for a more elaborate showing from those utilizing channel loading, concluding that the Commission's eligibility requirements are sufficient to deter ITFS applicants seeking a "financial bonanza." Other commenters also favoring the unrestricted use of channel loading, however, articulated the need for some vehicle to eliminate unqualified educator-applicants. Cross Country Wireless Cable, California State Polytechnic University at Pomona, Regents of the University of California, Diocese of San Bernardino Education & Welfare Corporation, and San Bernardino Community College District (jointly, Cross Country/Box Springs), which support channel loading, and HITN, which conditionally does so, separately urged the Commission to require applicants proposing to channel load to justify their need for shifting their programming to fewer than four channels and to describe the duration and extent of that practice. Existing ITFS licensees intending to channel load, Cross Country/Box Springs added, should justify their need to do so. ITFS Parties, which originated the notion of a heightened demonstration of educational *bona fides, see Notice*, 8 F.C.C. Rcd at 2831, urged the Commission to engage in "healthy skepticism" in determining whether receive sites are actually incorporating the programming into the curricula of accredited educational receive sites. Although stating their reluctance to augment licensees' regulatory requirements, ITFS Parties urged the filing by channel-loading ITFS licensees of annual reports, detailing the actual educational use of the ITFS facilities during the previous year. Catholic Television Network (Catholic TV) also advocated that licensees be required to submit "periodic evidence" of the educational uses of its

channels, including how many matriculating students benefit from the ITFS service and how the channel-loading scheme jibes with the classroom hours of operation.

Other safeguards. Cross Country/Box Springs and the University of California endorsed the Commission's installation of an ITFS telephone "advice line" in order that licensees may readily seek Commission assistance on their rights and responsibilities, especially with regard to educational program scheduling and the leasing of airtime to wireless cable operators. In this way, the commenters contended, the Commission could educate ITFS licensees with limited experience in negotiating leasing agreements, thereby preserving the primary use of the ITFS spectrum.

Termination date. Several commenters advocating channel loading took issue with the proposed three- to five-year termination date of the proposed rules changes. Rural Wireless Group, voicing the concerns of small wireless cable system operators, recommended that the Commission extend the "sunset" period for channel loading to a date 10 years following the arrival of digital compression technology. This, it argued, would allow for full amortization of the current analog equipment and for raising capital to purchase digital equipment. Composed of about a dozen wireless operators owning systems across the country, the Coalition of Concerned Wireless Cable Operators, describing the sunset date as "inflexible," advanced a certification process, whereby operators certifying in good faith their inability to convert to digital technology would obtain an additional five years to make the transition from analog. Similarly, WJB-TV suggested that each wireless cable system continue to employ channel loading until it converts to digital. In contrast, NIA, the only opposition commenter addressing the termination date issue, supported a shorter, two-year sunset period, grounded in the theory, it stated, that a shorter deadline can be more readily extended than a longer one can be abbreviated.

COMPROMISE AGREEMENT

9. On August 19, 1993, the extended deadline for reply comments in this proceeding, WCA submitted to the Commission for consideration an industry-wide channel loading compromise, agreed to by WCA, NIA and the ITFS Parties. Collectively, the three groups comprise licensees in the operation of virtually every wireless cable system in the United States, including ITFS and MDS, programming networks, wireless cable equipment manufacturers, and more than 70 educators nationwide, including the American Council on Education, the American Association of Community Colleges and the Alliance for Higher Education. The compromise, which attempts to resolve the most contentious issue confronting educators and wireless operators, ready recapture time, is predicated upon the concept that an individual licensee's leased ITFS facility is part of a larger transmission system in a given market, along with other leased ITFS stations and wireless cable operations.

10. Based on this model, the compromise contains five elements. First, it contemplates a continued minimum total of 40 hours per channel per week of ITFS programming, composed of 20 hours preserved for immediate use and of the remaining 20 hours subject to ready recapture. Second, as to the preserved time, each licensee must actually transmit at least 20 hours of ITFS programming per channel per week, 12 hours per channel per week for the first two years, as is now permitted. However, a licensee may load its total requirements onto fewer than all of the channels to which it is authorized. Thus, a licensee holding four authorized channels may load its weekly total required programming time, i.e., 20 hours multiplied by four channels, or 80 hours, onto fewer than the four channels. Under the terms of the compromise, transmission of this preserved amount of programming must be over channels licensed to the ITFS licensee. Third, and what WCA terms as "key" to the compromise, an ITFS licensee may agree to the transmission of its recapture time over any channel in the system, whether it be an ITFS or MDS channel. Yet, a licensee has the unabridgeable right to recapture simultaneous use of airtime on the number of channels for which it is authorized. This right, according to the compromise, cannot be contractually diminished and any lease agreement attempting to do so will be overridden by this restriction. Fourth, leasing and scheduling consistent with the compromise will establish an applicant's Section 74.902(d) "need" for channels and entitle a licensee to renewal of its authorization. And no demerit will be assessed against channel-loading applicants under the Commission's comparative selection procedure for mutually exclusive applicants. Fifth, the compromise provides that a channel-loading scheme comporting with the compromise not serve as a basis for future efforts to seek reallocation of "non-loaded" ITFS spectrum for commercial use and the parties to the compromise have agreed not to seek any such reallocation.

11. This five-part compromise was the subject of a 30-day comment period, beginning on September 28, 1993. *See Order Granting Extension of Time* in MM Docket No. 93-106, 8 F.C.C. Rcd 5245 (MMB 1993); 58 Fed. Reg. 42522 (August 10, 1993). Of the 27 parties addressing the proposal, 23 unconditionally support it; two, NIA and ITFS Parties, reemphasize their support based upon the adoption of all five elements; WJB-TV adamantly opposes its simultaneous recapture provision; and TVC renounces the entire compromise as an impermissible reallocation of the spectrum.

DISCUSSION

12. More than a decade ago, the Commission permitted licensees to lease their unused transmission time as a means of satisfying the increasing needs of MMDS operators for additional channel capacity and of meeting the mounting costs to educators of constructing and operating an ITFS system. *Report and Order* in Gen. Docket No. 80-112 and CC Docket No. 80-116, 94 F.C.C. 2d 1203, 1248-50 (1983). In so doing, however, the Commission restated its commitment to the primary purpose of the ITFS service, the transmission of programming for the formal education of students. *Id.* at 1253. Since then, the Commission's standards for the minimum required hours of ITFS programming have evolved in order to facilitate the ability of educators to finance the development of ITFS facilities and, at the same time, to ensure the full and efficient utilization of the spectrum, by allowing wireless cable operators to utilize the excess capacity of an ITFS licensee so as to compete with conventional cable operators. Now before us is a proposal for channel loading, which, rather than constituting a *de facto* reallocation of the ITFS spectrum to MMDS, defers to the educational purpose of the service by maintaining the current requisite total of 20 hours per channel per week of ITFS programming and endowing licensees with the unabridgeable right of simultaneous recapture of an additional 20 hours per

channel per week. Channel loading, therefore, does not alter the obligation of leasing ITFS licensees to transmit a total of 80 hours of ITFS program each week, but permits that programming to be consolidated so as to yield to wireless cable operators the benefit of full use of some ITFS channels. In addition, a natural by-product of channel loading will be the enhanced value of ITFS licensees' excess capacity to wireless cable operators, who may now be willing to supplement financial contributions already made to educators via their leasing arrangements. This may, in turn, contribute to the overall viability of the ITFS service and its significant public interest benefits.

13. Before the Commission permitted leasing of excess capacity, the spectrum initially allotted for ITFS was so underutilized outside metropolitan areas that the Commission reallocated two entire ITFS channel groups, or eight channels, to MMDS. *Id.* With the advent of leasing, demand for ITFS channels has surged. *See Notice,* 8 F.C.C. Rcd at 2832 n.14. Leasing has prompted revenue-sharing arrangements between ITFS licensees and wireless cable operators, *see id.*,[8] resulting not only in full use of the spectrum, but in full realization by educators of what was once only an unattainable aspiration: to become actively engaged in a technology that exposes their students to educational and interactive instructional programming previously inaccessible to them. But revenues are key to this ITFS-MMDS partnership. Leasing channel capacity for the transmission of commercial programming generates revenues that may be vital to the continuing operations of authorized ITFS systems, to the successful deployment in many markets of ITFS service, and to the service's public interest benefits. Our sanctioning of channel mapping a few years ago, in *Wireless Cable Order Recon.*, 6 F.C.C. Rcd at 6774, was an attempt to free up channels to yield such benefits, "allowing for sufficient use of all channel capacity while balancing the interests of both wireless cable operators and ITFS licensees." But, as Parkland College noted, not only is a channel mapping system expensive to build, but it is "prone to equipment breakdowns, operator errors, and mistakes due to miscommunication between the separate parties who may schedule and operate the system." The University of California observed that channel mapping creates disruption and switching interruptions in that the technology still requires significant adjustments for stereo and mono transmissions to be carried on the same channel and for smooth transitions when scrambled channels are switched from one signal input channel to another. The money spent on channel mapping, WCA suggested, "could be better spent" increasing educational activities and promoting new subscribers to the wireless cable systems. Moreover, Clarendon Foundation indicated that channel mapping adversely affects the relationship between ITFS licensees and their wireless cable partners: a more flexible leasing scheme, it observed, "will benefit our operations by streamlining the mecnanism by which we interact with local wireless cable operators."

14. We believe that our endorsement of channel loading will provide ITFS licensees with a less costly, more reliable method for satisfying our educational requirements, as we define them below, while allowing them flexibility to cultivate their partnerships with wireless cable operators, an arrangement we have sought to nurture over the last decade, to the welfare of the ITFS service and the public. This ITFS-wireless cable symbiosis is unique to the ITFS service. Moreover, we acknowledge that wireless cable operators endeavoring to compete with wired cable systems, whose number of channels often exceeds 50, must have access to as many of the available 32 or 33 ITFS and MMDS channels as possible in a given market. In today's market environment, MMDS channels and ITFS channels are interrelated components of an integrated set of channels used to provide nonbroadcast instructional and entertainment programming in a given market. To maximize the usefulness of this network to *both* MMDS and ITFS licensees, the latter should account for four channels in this network. What we conclude for the first time today, therefore, is that even if it does not transmit ITFS programming on each channel, an ITFS licensee "needs" a group of four channels to have the opportunity to be a valuable partner in a market-wide wireless cable system. That wireless cable system, in turn, will strengthen significantly the ITFS service by providing, or continuing to provide, a source of funds to promote the educational purposes of ITFS, even if educational programming is not transmitted on all ITFS channels. Thus, rather than compel nascent ITFS operators to request fewer than four channels, which might reflect their actual educational programming needs but which also would lead to "excessive balkanization of the ITFS spectrum," *Wireless Cable Order,* 5 F.C.C. Rcd at 6416, we shall allow an applicant's Section 74.902(d) "demonstration of need" obligation to be presumptively discharged if its schedule complies with the rules of channel loading, discussed below.

15. Forming the nucleus of the interim channel-loading rules we adopt today are the five elements of the industry-wide compromise, which, we find, hew to our objectives discussed above. However, fine-tuning of some of those elements is required to bolster the most essential of our objectives, that of preserving the primary purpose of ITFS. At the outset, we note that that objective is of overriding concern regardless of whether a licensee utilizes channel mapping or channel loading. *See Notice,* 8 F.C.C. Rcd at 2831. Thus, although the compromise did not directly address the boundaries for channel-mapping licensees, we observe that to treat them similarly is justified because channel loading is functionally the same as the already-sanctioned channel mapping technology. One commenter disagreed. TVC/Stanford, while recognizing the legitimacy of channel mapping under our current leasing rules, attempt to distinguish on two grounds its use from that of channel loading, and, concomitantly, the validity of channel loading. Those attempts are not persuasive.

16. First, TVC/Stanford argue that mapping technology does not affect an ITFS licensee's use of four channels in accordance with the minimum use requirements. We acknowledge that mapping technology actually *transmits* ITFS programming over all of a licensee's authorized channels, thereby literally executing the mandates of Section 74.931(a), that the licensee "transmit" on each authorized channel formal educational programming, and of Section 74.931(e), that the licensee "provide" at least 20 hours per week of ITFS programming on each channel before leasing

[8] More than 90% of the recently filed ITFS applications contained excess capacity lease agreements with wireless cable operators.

any of that channel's excess capacity. But the transmission of that programming over all authorized channels goes unnoticed by the student-viewers, the intended beneficiaries of the rules, who actually *receive* the programming on fewer than the number of authorized channels. Second, TVC/Stanford maintain that mapping technology does not adversely affect an ITFS operator's ability to schedule instructional programming to meet the needs of its students. Yet, we have observed that ITFS licensees engaged in channel mapping produce a "staggered" schedule of ITFS programming to facilitate the switching of blocks of programming from several channels to the ones dedicated to ITFS use.[9] Both methods could affect an ITFS licensee's use of its channels at a particular time. But under the scheme we adopt here, ITFS licensees who utilize either channel mapping or channel loading must be able to, indeed, are required to, air programming tailored to their students and, as discussed below, must now be prepared to justify its channel utilization during certain hours of the day.[10] We find that no plausible justification exists for permitting the use of channel mapping and denying the use of its functional equivalent, channel loading. To apply differing standards to each now, and we acknowledge that channel mapping technology was endorsed by the Commission without any specific guidance for its users,[11] would be unwarranted and would handicap those unable to afford costly channel-mapping technology.

17. As discussed in paragraph three above, the *Notice* in this proceeding indicated to educators and wireless cable operators that our concern was not "the mechanism by which ITFS channel time is made available to wireless cable operators, but how we can preserve the primary purpose of ITFS in light of our proposals here." 8 F.C.C. Rcd at 2831. With the exception of WJB-TV and TVC/Stanford, almost all commenters, both those opposed to and in favor of channel loading, equated channel mapping and channel loading. Our rules modification today support that conclusion. We believe that treating with differing standards two methods which are functional equivalents of each other would be irrational and contrary to the public interest and would favor those wireless cable operators able to afford costly channel mapping equipment by allowing them unfettered use of ITFS channels while restricting the use of those operators employing channel loading. Thus, the rules we adopt today for channel loading apply equally to channel mapping. However, we have provided that those licensees now operating under leases involving channel mapping will be grandfathered until the expiration of those leases. In the element-by-element analysis of the compromise below, we will refer, for shorthand purposes, to both mechanisms as "channel loading."

18. *First and second components.* We embrace the first element, which keeps in place the minimum of 40 hours per channel per week that a licensee must transmit from its ITFS system before leasing excess capacity. We also approve the portion of the compromise's second element which provides that 20 of those 40 hours per channel per week may be loaded onto fewer than the licensed channels. That the "loaded" programming must be transmitted over the licensee's own authorized channels, rather than over other channels in a market-wide MMDS/ITFS system, maintains the educational character of the ITFS channels. Indeed, licensees alone remain ultimately responsible for insuring that their physical facilities, their educational programming, and the commercial programming transmitted over their channels conforms with Commission rules and policies. *See Second Report and Order,* 101 F.C.C. 2d at 88-91.

19. What we reject in the second element, however, is the suggestion to transport to the channel-loading scheme the reduced minimum of 12 hours per channel per week, which reflects the Commission's separate, earlier accommodation of nascent ITFS systems. *See Wireless Cable Order,* 5 F.C.C. Rcd at 6416. Two years ago, the Commission relaxed the leasing rules so as to permit new entities to begin operations and lease excess capacity with a minimum of 12 hours of educational programming per channel per week for the first two years of operation. *Id.* Accordingly, a licensee, during its first two years, may transmit as few as two hours per channel, Monday through Saturday, an amount creating little, if any, impediment to the leasing of excess capacity on those channels. Under a channel-loading plan, wireless cable operators' access to as many as three entire channels for commercial programming should place them in a better economic position and enable them to fund and/or provide an average of at least 20 hours per channel per week of ITFS programming. Moreover, because the 12-hour-per-channel-per-week option seeks to "stimulate ITFS expansion and facilitate the initiation of new wireless cable systems," *id.*, the identical purpose underlying our adoption of channel loading, we view channel loading as an alternative to, not an appendage of, the two-year, 12-hour minimum. Although a licensee may not use the two plans in tandem, it may choose the reduced 12-hour alternative for the first two years and opt for channel loading on a 20-hour-per-channel-per-week basis thereafter.

20. *Third component.* We agree that it is most practicable to view a licensee's group of four ITFS channels as an integral constituent of a market-wide set of channels used to transmit instructional and entertainment programming. This set of channels comprises 16 other ITFS channels and and as many as 13 MMDS channels. Thus, we affirm the third element of the compromise, that which permits recapture time to be transmitted over another ITFS or MMDS channel within a given market-wide system. It must be underscored, however, that the unabridgeability of licensee rights vis-a-vis this reserved 20 hours per channel

[9] For example, to accommodate a channel-mapping scheme which shifts all ITFS programming to one channel, say channel 4, an ITFS licensee might have to schedule its educational programs from 8:00 a.m. to 10:00 a.m. on channel 1, from 10:00 to noon on channel 2, from noon to 2:00 on channel 3, and from 2:00 to 4:00 p.m. on channel 4. In this way, although ITFS programming would be literally transmitted over all four channels, the shifting of the programming from channels 1 through 3 to 4 would free up for full-time commercial use three ITFS channels.

[10] Additionally, the inherent advantage to educators of mapping technology, isolating educational materials from commercial programming so as to avoid student viewing of entertainment fare, is equally intrinsic to channel loading. *See Notice,* 8 F.C.C. Rcd at 2830.

[11] The Commission cautioned channel-mapping licensees that it would continue to review ITFS programming proposals "to assure that the nature and scheduling of ITFS programming is consistent with the primarily educational purpose of this spectrum," *Wireless Cable Order Recon.,* 6 F.C.C. Rcd at 6774 n.47. It also noted that "the appropriate educational use of licensed ITFS frequencies will also be reviewed upon renewal." *Id.*

per week, as described in the compromise, necessarily precludes a wireless operator from penalizing an ITFS licensee for invoking its right to transmit ITFS programming simultaneously on its number of authorized channels. Any clause in the lease agreement which exacts a penalty or constitutes a disincentive for exercise of this basic licensee right must be eliminated before we approve an application proposing channel loading. Moreover, because an ITFS licensee choosing to channel load restricts its own programming to fewer than four channels, recapture time may play a more vital role in fulfilling its educational mission than it now does. We determine, therefore, that channel-loading and channel-mapping licensees may invoke their recapture rights subject to six months' written notification to the wireless cable operator, rather than the one-year notice required under the prevailing rules, under which it must utilize all four channels.[12] This shortened notice period is an appropriate trade-off for wireless cable operators, who may transmit the recaptured ITFS programming on any channel in the market-wide system, not only on those authorized to the licensee. Under channel loading, ITFS licensees must undertake the obligation of insuring that their recapture-time programming, if it is to be transmitted over channels other than their own, actually reaches their students. It is also expected that the licensee will know in advance the channel or channels within the transmission system on which to receive its own shifted, recapture-time programming. The wireless cable operator in a channel-loading arrangement also assumes some obligations, primarily to insure that the entire recapture time invoked by the ITFS licensee, upon the requisite six months' notice, is transmitted during times of the day and days of the week requested.

21. Although this simultaneous recapture provision may, as WJB-TV contends, discourage some wireless cable operators from engaging in channel loading, it does not preclude them from continuing to operate under the current non-channel-loading leasing rules, whereby a licensee may negotiate its recapture time without a simultaneous use provision.[13] A wireless operator desiring to utilize channel loading and reap its benefits must abide by its attendant conditions, but may negotiate with the ITFS licensee based upon its perceived value of the channel loading arrangement as we define it today. That is, a wireless cable operator and an ITFS licensee are free to enter a lease agreement involving channel loading, ascribing to that arrangement whatever dollar value they believe fair. However, because they were negotiated in good faith under our former rules, all lease agreements providing for channel mapping which were executed and filed with the Commission prior to the release date of this Order will be grandfathered so as to permit continued use of channel mapping. The renewal of such leases, however, must comply with the standards set forth above. We disagree with WJB-TV's suggestion that we grandfather current lease provisions relating to ready recapture, presumably so that wireless operators may switch to channel loading under their existing agreements. This would contractually preclude ITFS licensees from invoking recapture time on all of their authorized channels on a simultaneous basis, an undesirable result. The basis of the bargaining should not have included channel loading, a practice we now allow for the first time. Thus, once our rules become effective, all lease agreements, and renewals thereof, involving channel-loading and channel-mapping and executed on the date of adoption or after must adhere to the rules we adopt today.[14]

22. *Fourth component.* The fourth factor contains three segments. The first two provide that applicants will be deemed to have discharged the "demonstration of need" obligation of Section 74.902(d) and satisfied renewal requirements, so long as they channel load within the parameters of the compromise. We believe, as discussed above, that Section 74.902(d)'s "need" requirement should be modified to more accurately reflect the reality that educators do, in fact, "need" the full complement of the four channels in a given channel group in order to attract and retain as "partners" the wireless cable operator, without whom the ITFS system might never be constructed and operated. In 1985, when the now-existing "demonstration of need" provision of Section 74.902 was adopted, the Commission decided to consider each application and its accompanying demonstration of need on an *ad hoc* basis, taking into consideration such factors as "the amount of use of any currently assigned channels and the amount of proposed use of each channel requested, the amount of, and justification for, any repetition in the schedules, and the overall demand and availability of ITFS channels in the community." *Second Report and Order*, 101 F.C.C. 2d at 77; *see also* 47 C.F.R. §74.902(d). Documentation as to those factors, the Commission stated, were to be the proposed weekly schedule for each channel requested and a "narrative showing of need for each channel to meet traditional programming proposals." *Id.*

23. Over the past nine years, the Commission, in practice, has come to rely primarily on the proposed schedules, the more concrete representation as to anticipated ITFS usage, and secondarily on the narratives, which largely replicate information that can be gleaned from the schedules and receive site lists. As a result, the threshold for need has come to be equated with that detailed in Section 74.931(e), that is, the minimum amount of ITFS programming required of licensees before they may lease excess capacity. The introduction of channel loading should not be cause for upsetting this equilibrium. Section 74.902(d)'s "demonstration of need" provision, therefore, will be amended so that an applicant complying with Section 74.931(e), that is, transmitting an average of 20 hours of ITFS programming per channel per week, will have presumptively demonstrated "need," rebuttable by demonstrating that the ITFS application does not comply with the programming requirements set forth in paragraph 26, below. A narrative showing of need, therefore, will no longer be required of any applicant. Accordingly, we shall delegate authority to the Chief, Mass Media Bureau, to amend FCC Form 330 to delete Question 3 of Section IV.

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[12] The one-year written notification requirement, *see Wireless Cable Recon.*, 6 F.C.C. Rcd at 6774, will remain as the standard lease provision for those licensees neither channel loading nor channel mapping.

[13] In *Wireless Cable Order Recon.*, 6 F.C.C. Rcd at 6774, we left licensees and wireless cable operators free to negotiate the schedules for transmission of required programming quantities. Prior to that modification, the recapture time had to be scheduled between 8:00 a.m. and 10:00 p.m., Monday through Saturday, with three hours per channel per day of such programming carried Monday through Friday.

[14] Agreements entered into between the adoption date and the effective date must, upon the effective date of the rules, be modified to conform with the new rules.

24. It is true, as TVC/Stanford observe, that the Commission rejected channel loading a little more than three years ago in *Wireless Cable Order*, 5 F.C.C. Rcd at 6416. But we did so not because it would result in a *de facto* reallocation or would violate the Act, but because it would breach our then-held view that applicants should request only the number of channels that they can utilize. In light of the discussion above, that "need" for channels parallels the programming obligations of Section 74.931(e), we have changed our views on this matter. We find that a channel-loading scheme, replete with the requirements included in this Order, adheres to the letter and spirit of Section 307(b) of the Act, which provides that the Commission must distribute licenses, frequencies, and hours of operation so as to provide a "fair, efficient, and equitable" distribution of service. Further, the proposal we did repudiate in *Wireless Cable Order* as constituting a *de facto* reallocation and a violation of Section 307(b) of the Act was not channel loading, but one to eliminate all ITFS programming requirements so that ITFS licensees could lease their entire capacity if they determined that the revenues derived from leasing would be more valuable than its own use of the spectrum. That is, we found that it would be improper to authorize to an educator a portion of the ITFS spectrum which would be devoid of at least a threshold amount of ITFS programming. We maintain that belief and emphasize that such a proposal is impermissible under the current ITFS allocation.

25. We neither believe nor intend that our action here constitutes a reallocation of the spectrum. To the extent that our decision to allow ITFS licensees greater flexibility could be viewed as, in effect, allocating part of the ITFS spectrum for wireless cable use, insofar as educators elect to enter into excess capacity leases, we conclude, based on the record before us, that such action serves the public interest. In this regard, our action both bolsters the ITFS service by giving ITFS licensees additional options, while ensuring that the fundamental purpose of ITFS is achieved. At the same time, our action today will promote wireless cable operators as a viable competitor to the cable television industry by providing the potential for greater channel availability. Yet, while we believe this flexibility for ITFS licensees will benefit both the ITFS and MMDS services, we remind ITFS licensees that channel loading is permissive only, and not mandatory. Thus, those educators desiring to transmit instructional programming simultaneously on each of their authorized channels may continue to do so, negotiating leases that are consistent with their educational objectives and Commission rules. Indeed, ITFS licensees may decline altogether to lease their excess airtime. Thus, our rule amendments here, adopted within this notice and comment rule making proceeding, are fully consistent with Section 307(b) and serve the public interest.

26. We remind all applicants that while channel loading alters the essential use standard so as to permit all requisite ITFS programming to be shifted to fewer than all four channels in a four-channel system, formal education remains the cornerstone of the ITFS service. *Second Report and Order*, 101 F.C.C. 2d at 81. To this end, we now clarify how channel-loading applications will be processed. First, we shall continue to mandate that each ITFS system carry some formal educational programming, that is, programming offered to students enrolled at accredited schools for credit toward an academic degree or diploma. Additionally, as is now the practice, each applicant must submit with its application a proposed schedule, with a brief description of programs not recognizable by their titles. *See* FCC Form 330, Section IV, Item 5. Because channel loading shifts the crux of this service to as few as one or two channels, the type of programming and time of transmission becomes ever more vital to ensuring that licensees meet basic minimum programming requirements and that that programming is transmitted to receive sites when students are there. Thus, program schedules and grids must reflect, as nearly as possible, the programming the applicants intend to transmit during their first year of operations. This is a departure from our current processing standard, in which the schedule has been reviewed by staff as one for illustrative purposes only. We caution all ITFS applicants employing channel loading that their schedules cannot be generic. Rather, these programming schedules must be tailored to the specific, anticipated needs of the applicants and and their receive sites for the first year of operation. As with all plans, we realize that these needs may change. But such changes must be reflected in amendments to pending applications, with accompanying narrative justification for those changes, and will be entitled to no comparative upgrade unless filed on or before the B cut-off date. Not only will this compel applicants to carefully plan which ITFS programs to transmit to which audience at which time of the day and week, it will also produce a schedule more readily capable of Commission examination. An applicant channel loading all ITFS programming onto one channel translates into 80 hours, or four channels multiplied by the 20 requisite hours per channel, of programming on a single channel per week, an amount which would, for most applicants, necessarily entail scheduling programming outside normal school-day hours. Thus, in order to comply with the fundamental purpose of ITFS, applicants may be able to free up for commercial use less than three full channels.[15] We shall continue to review schedules to assure that the nature of the programming is consistent with the primarily educational purpose of this spectrum, *see Wireless Cable Order Recon.*, 6 F.C.C. Rcd at 6774 n.47, and we reserve the right to seek justification as to the time-of-day and day-of-week slots assigned to ITFS programming that are obviously well outside traditional school hours. Applicants must be ready and able to document genuinely educational purposes for their schedules at any time. The videotaping of ITFS programming which is transmitted in the early hours of the day for later replay during the school day appears, as we noted in *Wireless Cable Order*, 5 F.C.C. Rcd at 6416, "unredeemably wasteful of the spectrum" and libraries for such taped presentation can be readily assembled without the use of ITFS facilities. Compliance with the above will also be reviewed upon renewal. We shall delegate to the Chief, Mass Media Bureau, the authority to amend FCC Form 330-R to require renewal applicants engaged in channel loading at least one year

[15] It may be that a licensee can properly serve its designated receive sites on one channel plus a fraction of another. Any configuration of programming is permissible so long as it is justifiably for educational purposes. For example, a licensee which is a college or university may determine that it will transmit programming from 7:00 a.m. to 6:00 p.m., Monday through Friday, and from 8:00 a.m. to 1:00 p.m. on Saturday, on one channel, and from 8:00 a.m. to noon, Monday through Friday, on a second channel, for a total of 80 hours per week.

prior to the expiration date of their licenses to submit a copy of their program schedules for the last year of operations. A written justification, based upon educational principles, should accompany such schedules containing any programming that was transmitted obviously outside traditional school hours. We find that this approach to enforcing the minimum amount of programming required of ITFS licensees proposing to channel load will preserve for educational programming its preeminent role in the ITFS service.

27. As for the third segment of this component of the compromise, we agree that no demerit is to be assessed against channel-loading applicants in the comparative selection procedure. However, we shall continue to abide by the directive of Section 74.913, Note 2 of our rules, which considers for programming merit point purposes only that ITFS programming scheduled between the hours of 8:00 a.m. and 10:00 p.m., Monday through Saturday.

28. **Fifth component.** The fifth element provides that the Commission's adoption of channel loading will not serve as the basis for future efforts to seek reallocation of "non-loaded" ITFS spectrum for commercial use. While the parties to the compromise have assented to refrain from seeking reallocation, such voluntary forbearance will not dissuade the Commission, upon an appropriate public interest showing, from examining in the future the efficient use of the ITFS spectrum. However, as emphasized above, no reallocation of ITFS spectrum, of either loaded or non-loaded channels, will emerge from the interim channel-loading rules we adopt today.

29. **Sunset provision.** Finally, after weighing the concerns of small wireless cable operators, which believe they will be unable to implement digital compression technology immediately upon its availability, and those of educators, which believe a shorter sunset period would advance the primary purpose of ITFS, we conclude that the channel loading rules adopted here will remain in effect until we assess the impact of digital compression on both the MMDS and ITFS services, through a future notice and comment rule making proceeding. Lease agreements permitting channel loading and mapping must acknowledge that those practices are subject to any future Commission rule changes. In conclusion, we believe that these provisions will promote the continued vitality of the ITFS service, with its important public interest benefits, as well as assist the development of MMDS as a competitive alternative to cable.

ADMINISTRATIVE MATTERS

30. *Final Regulatory Flexibility Analysis.* Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds:

Reason for the action: The purpose of this action is to allow for the further use of a licensee's excess airtime capacity by wireless cable operators.

Summary of issues raised by the public comments in response to the initial Regulatory Flexibility Analysis: There were no comments submitted in response to the Initial Regulatory Flexibility Analysis.

Significant alternatives considered and rejected: The Commission considered altering the simultaneous recapture right so that a licensee and wireless cable operator could negotiate the number of channels, times of the day, and days of the week for transmitting the recapture time. This unabridgeable right contained in the industry-wide compromise was deemed to be essential to educators agreeing to the compromise. We conclude that the simultaneous recapture right is a restriction on the use of channel loading necessary to maintain the primary purpose of the ITFS service.

The Commission also considered retaining the one-year's notice required of licensees invoking their ready recapture time under the current leasing rules. The Commission finds that a shorter, six-months' notice is needed by channel-loading licensees, whose one or two channels may not fulfill its educational needs as readily as do four under the prevailing rules.

31. The Secretary shall send a copy of this *Report and Order,* including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 4 U.S.C. §601, *et seq.* (1981)).

32. For additional information on this proceeding, contact Anne Lucey, Mass Media Bureau, (202) 632-6357.

ORDERING CLAUSES

33. IT IS THEREFORE ORDERED that pursuant to the authority contained in Section 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 303(r), Part 74 of the Commission's Rules, 47 C.F.R. §74, IS AMENDED as set forth in Appendix B below.

34. IT IS FURTHER ORDERED that the amendments to 47 C.F.R. Part 74 adopted in this *Report and Order* will be effective 30 days after publication in the Federal Register.

35. IT IS FURTHER ORDERED that the Chief, Mass Media Bureau, is delegated authority to amend FCC Forms 330 and 330-R, subject to the approval of the Office of Management and Budget.

36. IT IS FURTHER ORDERED that Mass Media Bureau Docket No. 93-106 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Comments to the Notice:

1. American Council on Education, American Association of Community Colleges, Alliance for Higher Education, Arizona Board of Regents for Benefit of the University of Arizona, Board of Regents of the University of Wisconsin System, Iowa Public Broadcasting Board, Regents of the University of New Mexico and Board of Education of the City of Albuquerque, South Carolina Educational Television Commission, State of Wisconsin - Educational Communications Board, and University of Maine System (ITFS Parties)
2. Besozzi, Gavin & Craven
3. Board of Cooperative Educational Services of Nassau County (Nassau County)
4. The Board of Education of the Township of Union, New Jersey
5. Butler County Community College
6. Catholic Television Network
7. Clarendon Foundation
8. Coalition of Concerned Wireless Cable Operators
9. Cross Country Wireless Cable I, L.P., California State Polytechnic University at Pomona, San Bernardino Community College District, the Diocese of San Bernardino Education and Welfare Corporation, and the Regents of the University of California (Cross Country/Box Springs)
10. Diocese of Oakland
11. Kern Educational Telecommunications Consortium
12. Metropolitan Community College
13. Missouri Southern State College
14. National ITFS Association (NIA)
15. New Orleans Educational Telecommunications Consortium
16. North American Catholic Educational Programming Foundation, Inc. (NACEPF)
17. Parkland College
18. The Regents of the University of California (University of California)
19. Rural Wireless Cable Group (Rural Wireless Group)
20. Trans Video Communications, Inc. and the Trustees of Leland Stanford Junior University (TVC/Stanford)
21. Transworld Telecommunications, Inc. (Transworld)
22. United States Distance Learning Association
23. University of Colorado at Boulder
24. University of Maryland
25. University of Louisville
26. Wireless Cable Association International, Inc. (WCA)
27. WJB-TV Limited Partnership (WJB-TV)

Reply comments:

1. American Council on Education, et al.[1]
2. Besozzi, Gavin & Craven
3. Coalition of Concerned Wireless Cable Operators
4. Kern Educational Telecommunications Consortium
5. Hispanic Information and Telecommunications Network, Inc. (HITN)
6. The Learning Society of Elkhart Inc.
7. National ITFS Association[1]
8. Spokane Falls Community College, Sponkane Community College, and Gonzaga University Telecommunications Association[1]
9. Trans Video Communications, Inc. and The Trustees of Leland Stanford Junior University
10. Wireless Cable Association International, Inc.[1]
11. WJB-TV Limited Partnership

Comments to compromise:[2]

1. Butler County Community College
2. California Amplifier, Inc.
3. Coleman (Texas) Independent School District
4. Dade County (Florida) Public Schools
5. Decathlon Communications, Inc.
6. Goldthwaite (Texas) Independent School District
7. INTELECOM Intelligent Communications
8. Lohn (Texas) Independent School District
9. Missouri Southern State College
10. Mullin (Texas) Independent School District
11. North American Catholic Educational Programming Foundation, Inc.
12. PACE Telecommunication Consortium
13. Panther Creek (Texas) Consolidated Independent School District
14. Priddy (Texas) Independent School District
15. Rochelle (Texas) Public Schools
16. Santa Anna (Texas) Independent School District
17. Star (Texas) Public Schools
18. Township of Union (New Jersey) Public Schools

[1] These reply comments included a discussion of the compromise agrement.

[2] Oklahoma City University and the University and Community College System of Nevada separately submitted late-filed comments to the compromise. Nevertheless those comments have been incorporated and considered in this proceeding.

19. Trans Video Communications, Inc.

20. University of Arizona

21. WJB-TV Limited Partnership

APPENDIX B

Part 74 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 74 continues to read as follows:

AUTHORITY: 47 CFR Secs. 4, 303 48 Stat. 1066, as amended, 1082, as amended, 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply Secs. 301, 303, 307, 48 Stat. 1081, 1082, as amended, 1083, as amended; 47 U.S.C. 301, 303, 307.

2. Section 74.902 is amended by moving all of the current (d) to (d)(1) and adding (d)(2) as follows:

§74.902 Frequency assignments.

*****

(d)(2) An applicant leasing excess capacity and proposing a schedule which complies in all respects with the requirements of Section 74.931(e) will have presumptively demonstrated need, in accordance with paragraph (d)(1) of this section, for no more than four channels, all part of the same Group listed in paragraph (a) of this section. This presumption is rebuttable by demonstrating that the application does not propose to comport with our educational programming requirements, that is, to transmit some formal educational programming, as defined in Section 74.931(a), and to transmit the requisite minimum programming of Section 74.931(e) for genuinely educational purposes and to receive sites when students are there.

3. Section 74.931 is amended by revising paragraphs (a)(1) and (e)(9) as follows:

§74.931 Purpose and permissible service.

(a)(1) Instructional television fixed stations are intended primarily to provide a formal educational and cultural development in aural and visual form, to students enrolled in accredited public and private schools, colleges and universities. Authorized instructional television fixed station channels must be used to transmit formal educational programming offered for credit to enrolled students of accredited schools, with limited exceptions as set forth in paragraph (e)(9) of this section and Secs. 74.990 through 74.992 of this part.

*****

(e)(9) A licensee may shift its requisite ITFS programming onto fewer than its authorized number of channels, via channel mapping technology or channel loading, so that it can lease full-time channel capacity to a wireless cable operator, subject to the condition that it provide a total average of at least 20 hours per channel per week of ITFS programming on its authorized channels. The licensee also retains the unabridgeable right to recapture, subject to six months' written notification to the wireless cable operator, an average of an additional 20 hours per channel per week for simultaneous programming on the number of channels for which it is authorized. The licensee may agree to the transmission of this recapture time on channels not authorized to it, but which are included in the wireless system of which it is a part.

SEPARATE STATEMENT
OF
COMMISSIONER JAMES H. QUELLO

RE: ITFS Channel Loading
(MM Docket No. 93-106)

Over the course of the last ten years it has been necessary for the Commission to deal in an evolutionary manner with the evolving ways that the ITFS and MMDS services alternately complement, and conflict, with one another. They complement each other, as today's Report and Order correctly notes, because each forms a segment of an interwoven set of channels used to provide both instructional and educational programming in a given area. Yet at the same time they conflict with one another because the slow growth of channel utilization by many ITFS licensees matches up poorly with the profit-motivated, demand-driven growth of MMDS systems. The Commission's objective today remains the same as it has always been - to tailor its rules to assure that the instructional uses of ITFS are ultimately preserved, and even enhanced, by compatible use of ITFS channels by MMDS licensees.

The Report and Order we adopt today carries forward the Commission's "win/win" strategy for ITFS and MMDS licensees. Channel loading will achieve the same result as channel mapping without its inefficiencies. ITFS licensees wishing to opt for channel loading should find their instructional programming presented in a cohesive channel format that should prove user-friendly to the student audience, and the channel reclamation rules implemented today should assure ITFS licensees of their ultimate right to broadcast as much instructional programming as their channel allocation would otherwise accommodate. We also carry forward existing policies that allow lessor ITFS licensees to enjoy the benefits of leased channel revenues contributed by lessee MMDS licensees. MMDS licensees are in turn assured of a stable complement of leased ITFS channels and they will have fair notice of, and ability to adapt to, increased future channel usage, by ITFS channel lessors.

Perhaps the most encouraging aspect of today's Report and Order, however, is that it underlines the fact that the coming information superhighway will actually be composed of many different "lanes" of telecommunications services. To the extent that we have today helped to assure that both ITFS and MMDS will be component parts of that highway, we have acted in the best interests of the public as well as of the licensees most immediately involved. And that, in my book, makes this Report and Order worthy of the endorsement the Commission gives it.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: July 15, 1994

CARRIERS FILE REVISIONS TO THEIR COST ALLOCATION MANUALS

PUBLIC COMMENTS INVITED

Several local exchange carriers proposed revisions to their cost allocation manuals (CAMs) for the separation of regulated and nonregulated costs for the quarter ended June 30, 1994. Listed below are the names of the carriers that filed revisions and the file number assigned to each revision.

Ameritech	AAD 94-77
Bell Atlantic	AAD 94-78
BellSouth	AAD 94-79
Cincinnati Bell Telephone Company	AAD 94-80
Citizens Utilities	AAD 94-81
GTE	AAD 94-82
Lincoln Telephone	AAD 94-83
Nevada Bell	AAD 94-84
NYNEX Telephone Companies	AAD 94-85
Pacific Bell	AAD 94-86
Puerto Rico Telephone Company	AAD 94-87
Rochester Telephone	AAD 94-88
Southern New England Telephone Company	AAD 94-89
Southwestern Bell	AAD 94-90
United Telephone/Central Telephone Company	ADD 94-91
U S West, Inc.	AAD 94-92

The following company filed a letter stating there were no changes to its CAM for the quarter ended June 30, 1994.

AT&T	AAD 94-76

Parties may file comments on the proposed revisions to the CAMs no later than **August 15, 1994**. Replies should be filed by **August 30, 1994**. Comments should reference the applicable AAD file number listed above. A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L St., N.W., Room 812, Washington, D.C. 20554 and the International Transcription Service (ITS), 2100 M St., N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room 2000 L St., N.W., Suite 812, Washington, D.C. Copies are also available from ITS.

For further information contact Alicia Dunnigan at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-230

In the Matter of

Amendment of Section 73.202(b),	RM-8298
Table of Allotments,	RM-8359
FM Broadcast Stations.	
(Madison, South Dakota and	
Slayton, Minnesota)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 30, 1994; Released: July 15, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 8 FCC Rcd 5115 (1993), issued in response to a petition filed by Wallace Christensen ("Christensen"). Christensen requested the substitution of Channel 276C2 for Channel 276A at Slayton, Minnesota, and modification of his construction permit for Station KLOH-FM to specify operation on Channel 276C2. Christensen also requested the substitution of Channel 288A for Channel 276A at Madison, South Dakota, and modification of the license for Station KJAM-FM to accommodate the upgrade at Slayton. Christensen filed comments restating his support for the allotment of Channel 276C2 at Slayton. Comments and a counterproposal were filed by Madison Broadcasting Company, Inc. ("Madison Broadcasting").[1] Christensen and Madison filed joint reply comments.

2. Madison Broadcasting counterproposed the substitution of Channel 276C2 for Channel 276A at Madison, South Dakota, and the modification of the license for Station KJAM-FM to specify operation on the upgraded channel. Madison Broadcasting further proposes the substitution of Channel 291C2 for Channel 276A at Slayton, Minnesota, and modification of the construction permit (BPH-921216MC) for Station KLOH-FM to specify operation on Channel 291C2. According to Madison Broadcasting, Channel 291C2 can be allotted to Slayton at the site presently specified in Christensen's construction permit. Madison Broadcasting points out that, if accepted, its counterproposal provides wide-area FM service to both Madison, South Dakota, and Slayton, Minnesota, rather than simply to Slayton, as proposed in the *Notice*.

3. Christensen and Madison Broadcasting submitted joint reply comments. Christensen stated that his primary interest is to obtain a C2 allotment at Slayton and that he has no objection to the allotment of Channel 291C2 in lieu of Channel 276C2 at Slayton. Christensen and Madison Broadcasting believe that the counterproposal filed by Madison constitutes an incompatible channel swap and that competing expressions of interest for Channel 291C2 at Slayton should not be considered, if received. Christensen and Madison Broadcasting refer to the *Modification of FM Broadcasting Licenses to Higher Class Co-Channel or adjacent Channels*, 60 RR 2d 114 (1986), wherein the Commission considered variations of the mutual exclusivity rule that would allow existing licensees to upgrade while protecting their interest in their existing facilities. Christensen and Madison Broadcasting argue that such a mutually exclusive relationship exists in this case as Channel 291 is the only channel currently available for allotment at Slayton. Although Christensen states his willingness to apply for Channel 291A at Slayton to accommodate an upgrade at Madison, Christensen and Madison Broadcasting believe the most prudent course of action is to allot Channel 276C2 to Madison and Channel 291C2 at Slayton, allowing for increased service in both communities.

4. Based on the above information, we believe the public interest would be served by substituting Channel 276C2 for Channel 276A at Madison, South Dakota. Channel 276C2 can be allotted to Madison at the current site for Station KJAM-FM.[2] We shall also substitute Channel 291C2 for Channel 276A at Slayton, Minnesota. Channel 291C2 can be allotted to Slayton, Minnesota, at the authorized site for Station KLOH-FM.[3] We shall also modify the license for Station KJAM-FM, Madison, to specify operation on Channel 276C2 and the Construction Permit for Station KLOH-FM, Slayton, to specify operation on Channel 291C2 in accordance with Section 1.420(g) of the Commission's Rules. Although Christensen and Madison Broadcasting argue that the Commission should not have solicited competing expressions of interest for Channel 291C2 at Slayton, the Commission staff did not undertake an analysis to determine if the counterproposal qualified as an incompatible channel swap pursuant to Section 1.420(g)(3) of the Commission's Rules in view of the fact that no additional comments were received expressing an interest in the allotment of Channel 291C2 at Slayton.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 29, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Madison, South Dakota	276C2
Slayton, Minnesota	291C2

[1] The counterproposal was put on public notice on October 22, 1993, Report No. 1978 (RM-8359). The Public Notice indicated that competing expressions of interest in the use of channel 291C2 at Slayton should be filed within fifteen days of the date of the Public Notice.

[2] The coordinates for Channel 276C2 at Madison are 43-59-08 and 97-07-42.

[3] The coordinates for Channel 291C2 at Slayton are 43-59-43 and 95-44-51.

6. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KJAM-FM, Madison, South Dakota, IS MODIFIED to specify operation on Channel 276C2 and the Construction Permit for Station KLOH-FM, Slayton, Minnesota, IS MODIFIED to specify operation on Channel 291C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee/permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

7. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Wallace Christensen, permittee of FM Station KLOH-FM, Slayton, Minnesota, and Madison Broadcasting Company, Inc., licensee of Station KJAM-FM, Madison, South Dakota, are required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cincinnati Bell Telephone Company — Transmittal No. 655

Revisions to
Tariff F.C.C. No. 35

ORDER

Adopted: June 30, 1994; Released: June 30, 1994

By the Acting Chief, Tariff Division, Common Carrier Bureau:

1. On May 17, 1994, Cincinnati Bell Telephone Company (CBT) filed the captioned tariff transmittal on 45 days' notice. These proposed revisions will increase the Carrier Common Line (CCL) rates that CBT charges interexchange carriers and others for access service. CBT Description and Justification at 1. This tariff is scheduled to become effective July 1, 1994.

2. On June 1, 1994, MCI Telecommunications Corporation (MCI) filed a petition to suspend and investigate the above transmittal. MCI contends that CBT should decrease rather than increase its CCL rates because, according to MCI, CBT's Long Term Support (LTS) obligation to the National Exchange Carrier Association (NECA) will decrease effective July 1, 1994. MCI Petition at 1-2. MCI complains that CBT improperly postpones the CCL rate decrease necessitated by this reduction in CBT's LTS obligation. MCI Petition at 3-4.

3. In its reply filed June 13, 1994, CBT contends that its current CCL rates are based on the LTS requirement and related information provided by NECA in 1993. CBT states that, when NECA increased that support requirement earlier this year, it became necessary for CBT to increase its CCL rates. CBT Reply at 2-3. CBT also claims that MCI fails to realize that CBT's current rates already reflect the anticipated July 1994 reduction in CBT's LTS obligation. CBT Reply at 3-4.

4. The Common Carrier Bureau has reviewed CBT Transmittal No. 655, MCI's petition, and CBT's reply. We conclude that these filings do not demonstrate that an investigation is warranted at this time.

5. Accordingly, IT IS ORDERED that the petition to suspend and investigate Cincinnati Bell Telephone Company Tariff F.C.C. No. 35, Transmittal No. 655, filed by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

David A. Nall
Acting Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Atlantic Telephone Companies — Transmittal No. 654

Revisions to
Tariff F.C.C. No. 1

MEMORANDUM OPINION AND ORDER

Adopted: July 6, 1994; Released: July 8, 1994

By the Acting Chief, Tariff Division, Common Carrier Bureau:

1. On May 2, 1994, the Bell Atlantic Telephone Companies (Bell Atlantic) filed the captioned transmittal on 45 days' notice. In this transmittal, Bell Atlantic proposes to make permanent the Primary Interexchange Carrier (PIC) Switchback Option service (Switchback Service) that it currently offers under a trial program.[1] The transmittal is scheduled to become effective July 31, 1994.

2. On May 17, 1994, AT&T Corp. (AT&T) petitioned to suspend and investigate the captioned transmittal. AT&T contends that data presented by Bell Atlantic are inadequate to reach any determination about the efficacy of this Switchback Service in reducing unauthorized PIC (UPIC) changes. AT&T cites other recent data to support its claim that, since the inception of this Switchback Service, there has been a recent increase in UPIC changes for AT&T customers in the Bell Atlantic Region. AT&T Petition at 5-8. Bell Atlantic replies that the figures cited by AT&T do not advance AT&T's argument because those figures do not distinguish between UPIC changes for all interexchange carriers (IXCs) in the Bell Atlantic Region and those attributable to Switchback Service subscribers. Bell Atlantic contends that the performance of subscribers during the trial period has been substantially better than the aggregate performance of the non-subscribers. Bell Atlantic Reply at 2-3.

3. AT&T also contends Bell Atlantic's Switchback Service cannot be reconciled with the Commission's presubscription policies which, AT&T claims, emphasize the need for IXCs to produce end-user letters of authorization (LOAs) when UPIC change disputes occur. AT&T argues that the availability of this service at a rate less than Bell Atlantic's usual UPIC charge eliminates the need for participating IXCs to obtain LOAs. AT&T Petition at 3-4. Bell Atlantic replies that availability of its Switchback Service does not affect the responsibility of IXCs to either obtain LOAs or to otherwise comply with the Commission's PIC verification procedures. Bell Atlantic also asserts there is no evidence that its customary UPIC charge is needed to reduce UPIC changes. Bell Atlantic Reply at 2.

4. The Common Carrier Bureau has reviewed Bell Atlantic Transmittal No. 654, AT&T's petition, and Bell Atlantic's reply. We conclude that these filings do not demonstrate that an investigation is warranted at this time.

5. Accordingly, IT IS ORDERED, that the petition to suspend and investigate Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 654, filed by AT&T Corp. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

David A. Nall
Acting Chief, Tariff Division
Common Carrier Bureau

[1] Bell Atlantic's trial offering of this service was filed under Transmittal Nos. 541, 549, and 562 and became effective on March 17, 1993. *See* Bell Atlantic Telephone Companies, 8 F.C.C. Rcd 2148 (Com. Car. Bur. 1993). Bell Atlantic's Switchback Service is available only for business and residential lines.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-162

In the Matter of

Local Exchange Carriers' Rates,
Terms, and Conditions for
Expanded Interconnection for
Special Access

Petition for Extension of Time for
Filing Supplemental Direct Case and
Response to Order to Show Cause

ORDER

Adopted: June 28, 1994; Released: June 29, 1994

By the Deputy Chief, Common Carrier Bureau:

1. On June 14, 1994, the United and Central Tier 1 Telephone Companies (United/Central) filed a petition for extension of time to file a supplemental direct case and answer to an Order to Show Cause in response to the Common Carrier Bureau's (Bureau) *Supplemental Order*[1] in the above-captioned docket. In that Order, the Bureau instructed United/Central, the Bell Atlantic Telephone Companies (Bell Atlantic), and Rochester Telephone Corporation (Rochester) to file supplemental direct cases on June 15, 1994 regarding their use of time and materials charges for central office construction for physical collocation.[2] The Bureau also directed United/Central to show cause why it had not complied with an earlier Bureau Order to delete references to individual case basis (ICB) rates in its physical collocation tariff.[3] On June 22, 1994, MFS Communications Company, Inc. (MFS) filed an opposition to United/Central's petition for extension of time.

2. United/Central requests an indefinite extension of time in which to file its pleadings in light of the recent decision by the United States Court of Appeals for the District of Columbia (D.C.) Circuit in *Bell Atlantic v. FCC*.[4] In its opinion, the D.C. Circuit vacated the Commission's requirement that local exchange carriers facilitate interconnection through the provision of physical collocation to competitive access providers and other interested parties.[5] According to United/Central, the Bureau's *Supplemental Order* is moot because it concerns issues relating to physical collocation.[6] United/Central seeks an extension of time until a court issues an order approving the Commission's authority to require physical collocation, or, in the absence of such an order, the Bureau "removes" the requirements of its *Supplemental Order*.[7] According to United/Central, an extension will save the companies and the Commission time and expense in preparation and review of material.[8]

3. MFS asserts that United/Central's extension petition was untimely because it was not filed at least seven days before the filing date of the supplemental direct case.[9] Moreover, MFS contends, even if the petition was timely, the Commission should not indefinitely delay review of United/Central's failure to comply with a Bureau Order.[10] Further, MFS maintains that despite *Bell Atlantic v. FCC*, United/Central's pleadings are highly relevant to the ongoing investigation of currently effective rates. According to MFS, grant of an indefinite extension of time will detract from the Commission's ability to judge the reasonableness of the charges that have already been paid by interconnectors.[11]

4. The Common Carrier Bureau has reviewed United/Central's request for extension of time and MFS's opposition. While we are mindful of the uncertainty in the interstate access marketplace in the wake of *Bell Atlantic v. FCC*, MFS correctly observes that the information requested by our *Supplemental Order* is relevant to the ongoing investigation of currently effective physical collocation tariffs. As MFS notes, this information will assist the Commission in judging the reasonableness of charges that interconnectors have paid and are currently paying pursuant to physical collocation tariffs. Accordingly, while we have determined that good cause has been shown to grant United/Central additional time, until July 15, 1994, to file its supplemental direct case and answer to our Order to Show Cause, we decline to grant United/Central's request for an indefinite extension of time. We will permit interested parties to file oppositions to United/Central's pleading no later than July 22, 1994.

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[1] *See* Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection for Special Access, Supplemental Designation Order and Order to Show Cause, CC Docket No. 93-162, DA 94-556 (released May 31, 1994) (*Supplemental Order*). In that Order, the Bureau designated an additional issue in the CC Docket No. 93-162 investigation. *See* Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection for Special Access, Order Designating Issues for Investigation, CC Docket No. 93-162, 8 FCC Rcd 6909 (Com. Car. Bur. 1993).

[2] *See Supplemental Order* at para. 20.

[3] *Id.* at para. 21. The Bureau stated that United/Central could combine into one document its answer to the Order to Show Cause and its supplemental direct case. *Id.* at para. 23.

[4] Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992); *recon.*, 8 FCC Rcd 127 (1992); *further modified on recon.*, 8 FCC Rcd 7341 (1993); *other pets. for recon. pending; partially vacated and remanded for further proceedings sub nom.*, Bell Atlantic v. FCC, No. 92-1619 (D.C. Cir. June 10, 1994).

[5] Slip op. at 10-11. The Court also remanded virtual collocation rules to permit the Commission to consider whether and to what extent virtual collocation should be imposed. *Id.* at 11.

[6] United/Central Petition at 2.

[7] *Id.* at 2-3.

[8] *Id.* at 3.

[9] MFS Opposition at 2 (*citing* Section 1.46(b) of the Commission's Rules, 47 C.F.R. § 1.46(b)).

[10] *Id.* at 2-3. According to MFS, United/Central's pleadings may have a direct bearing on whether the Commission takes punitive action against United/Central. *Id.* at 3.

[11] *Id.*

5. Accordingly, IT IS ORDERED that United and Central Tier 1 Companies' petition for extension of time IS GRANTED TO THE EXTENT SET FORTH HEREIN, and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief (Policy)
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Alascom, Inc.	Transmittal Nos. 761
Tariff F.C.C. No. 10	and 763

ORDER

Adopted: July 7, 1994; Released: July 8, 1994

By the Deputy Chief, Tariff Division, Common Carrier Bureau

1. On April 20, 1994, Alascom, Inc. (Alascom) filed Transmittal No. 761 to introduce its "Mile-A-Minute" Bonus Mileage Promotion. Under this promotion, Alascom's Message Telephone Service (MTS) customers who are members of Alaska Airlines' Mileage Plan and who provide Alascom with their Mileage Plan membership number are eligible to receive a credit of one mile for each full minute of interstate or international MTS calling billed to the customer's telephone number. Customers must inform Alascom of their desire to participate in the promotion.[1] On April 30, 1994, Alascom filed cost support for its "Mile-A-Minute" promotion. Transmittal 761 is scheduled to take effect on July 9, 1994.

2. On May 5, 1994, AT&T Corp. (AT&T) filed a petition to reject or suspend and investigate Transmittal 761, and General Communication, Inc. (GCI) filed a petition to reject the transmittal. Alascom replied on May 17, 1994.

3. In its petition, AT&T claims that any revenue shortfalls generated by the promotion will be passed on to AT&T under the Joint Service Arrangement (JSA), which requires AT&T to reimburse Alascom for all shortfalls in Alascom's interstate MTS revenue requirements.[2] AT&T states that Alascom should supply the data required under Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38, to permit AT&T to evaluate whether the promotion will adversely affect AT&T.[3]

4. GCI asserts that Alascom's promotion is unlawful because the MTS rates in the promotion do not mirror comparable MTS rates in AT&T's tariffs, thus failing to comply with the JSA's "rate integration" policy.[4] GCI also argues that even if Alascom were allowed to file MTS tariffs outside of the JSA, Alascom has not filed the cost support material required under Section 61.38 of the Commission's Rules.[5]

5. In its reply, Alascom argues that the Mile-A-Minute promotion is consistent with the JSA because it "effectively and materially mirrors" the AT&T "True Rewards" promotion. It claims that the cost distinctions between the two promotions are *de minimus* because the average dial station rate under the Alascom promotion approximates $0.21 per minute, while the same rate under the AT&T promotion approximates $0.20 per minute.[6] Alascom also contends that it is not required to provide any cost justification under the JSA because its promotion mirrors an AT&T interstate MTS offering.[7] Finally, Alascom argues that its promotion serves the public interest by enhancing competition, providing innovation in its services, and lowering long distance rates for its customers.[8]

6. On May 31, 1994, Alascom filed additional cost support for Transmittal 761. On June 1, 1994, Alascom filed Transmittal No. 763 to revise material previously filed in Transmittal 761.[9] Transmittal 763 is scheduled to take effect on July 9, 1994. On June 7, 1994, AT&T and GCI filed petitions to reject or suspend and investigate Transmittal 763.[10]

7. In their petitions, AT&T and GCI argue that Alascom's May 31, 1994 cost support is defective. AT&T claims the cost support does not include Alascom's network and billing costs and does not include all its marketing expenses.[11] AT&T also argues that it bears all of the "lower 48" expenses of MTS calls originating in Alaska, and that Alascom failed to include AT&T's expenses in providing service under the promotion.[12] GCI argues that Alascom does not include MTS revenue losses that will occur when Alascom MTS customers switch to the promotion, thus creating expenses to Alascom which should fall outside of the JSA.[13] Both AT&T and GCI argue that Transmittal 763 should be rejected because the promotion will not produce positive net revenues when all of the relevant costs are considered.[14]

8. Alascom replies that the "rate effects of Alascom's promotion are for all intents and purposes identical to those of AT&T," thus observing the "essential policy requiring Alascom to mirror" AT&T's interstate MTS rates.[15] It argues that the few differences between the Alascom and AT&T promotions are *de minimis*.[16] Alascom also argues that it filed cost materials only to illustrate that the promotion will contribute revenues to the JSA in excess of costs.[17] Finally, Alascom contends that the primary purpose of the JSA is to ensure that Alaskans have access to services comparable to those of AT&T customers in the other states. It claims that its promotion has been an intrastate

[1] Transmittal No. 761.
[2] AT&T Petition at 1.
[3] *Id.* at 2.
[4] GCI Petition at 2.
[5] *Id.* at 3-5.
[6] Alascom Reply at 2.
[7] *Id.* at 3-5.
[8] *Id.* at 3.
[9] Alascom, among other things, added tariff language listing the services for which credit will be awarded, and the services for which credit will not be awarded.
[10] Alascom filed a supplemental reply on June 24, 1994. As this pleading is outside the pleading cycle established by Section 1.773 of the Commission's Rules, 47 C.F.R. § 1.773, we dismiss the filing.
[11] AT&T Petition at 3.
[12] *Id.* at 4.
[13] GCI Petition at 11.
[14] AT&T Petition at 3; GCI Petition at 9-11.
[15] Alascom Reply at 3.
[16] *Id.*
[17] *Id.* at 5-6.

offering since June 1991, and contends that the JSA's purpose would be better fulfilled if the promotion could be applied to interstate calls as well. [18]

9. The Tariff Division has reviewed Alascom's two transmittals and the petitions filed against them. We conclude that, as revised, Alascom's promotion is not patently unlawful so as to warrant rejection and that an investigation is not warranted at this time.

10. Accordingly, IT IS ORDERED that the petition to reject or suspend and investigate Alascom Transmittal No. 761, filed by AT&T Corp., IS DENIED.

11. IT IS FURTHER ORDERED that the petition to reject Alascom Transmittal No. 761, filed by General Communication, Inc., IS DENIED.

12. IT IS FURTHER ORDERED that the petition to reject or to suspend and investigate Alascom Transmittal No. 763, filed by AT&T Corp., IS DENIED.

13. IT IS FURTHER ORDERED that the petition to reject or to suspend and investigate Alascom Transmittal No. 763, filed by General Communication, Inc., IS DENIED.

14. IT IS FURTHER ORDERED that the supplemental reply filed by Alascom, Inc. IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

David A. Nall
Deputy Chief, Tariff Division
Common Carrier Bureau

[18] *Id.* at 7.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY — File No. 94-123(AA)

Application to amend blanket authorization pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate satellite voice-grade bearer circuits between the United States and points in Central America, South America, the Caribbean Area and Africa during the years 1993-1997

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

ORDER AND AUTHORIZATION

Adopted: June 24, 1994; Released: July 18, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned, uncontested application filed by American Telephone and Telegraph Company (AT&T), pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require it grant.

2. Accordingly, IT IS ORDERED, that application File No. 94-123(AA) IS GRANTED and AT&T's blanket authorization to lease and operate satellite voice-grade circuits via appropriate INTELSAT satellites between the U.S. and points in Central America, South America, the Caribbean Area and Africa for the years 1993-1997 is further amended to add Anguilla, Dominica, St. Kitts, St. Barts, Nevis and Montserrat as authorized points of communication.[1]

3. All other terms and conditions set forth in AT&T's initial blanket authorization for the years 1993-1997, as amended, remain in effect.

4. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this Order. (*See* 47 C.F.R. § 1.4(b)(2)).

[1] AT&T's initial Blanket Authorization was approved in File No. I-T-C-93-006, 8 FCC Rcd 970 (1993), was amended to add new points in *AT&T*, 8 FCC Rcd 4317 (1993) and further amended to include additional locations in *AT&T*, 8 FCC Rcd 8392 (1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MICRONET, INC. File No. I-T-C-94-230

Application for authority
under Section 214 of the
Communications Act of 1934,
as amended, to operate
channels of communication
between the United States
and INTELSAT Atlantic Ocean
Region satellite and Russian
satellites Ghorizont 15 and
Ghorizont 11

ORDER AND AUTHORIZATION

Adopted: June 24, 1994; Released: July 18, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-caption uncontested application,[1] filed by Micronet, Inc. pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require authorization of Micronet to provide private line video, voice and data services.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-230 IS GRANTED and Micronet, Inc. is authorized to:

a. establish channels of communication between appropriately licensed earth stations in the U.S. and appropriate INTELSAT Atlantic Ocean Region (AOR) satellites, connecting with similar circuits between the satellites and the countries listed in Comsat's International Television service tariff for the provision of full-time and occasional use television service;

b. establish channels of communication between appropriately licensed earth stations in the U.S. and appropriate INTELSAT Atlantic Ocean Region (AOR) satellites, connecting with similar circuits between the satellites and the countries listed in Attachment A furnished by Micronet's correspondents in those countries; and

c. use the facilities set forth in subparagraph (b) above for the provision of private line voice and data services (24 64-kbps circuits to each location) between the U.S. and those countries listed in Attachment A.

3. IT IS FURTHER ORDERED that our authorization of Micronet to provide private lines as part of the services authorized herein is limited to the provision of such private lines only between the United States and the points listed in Attachment A -- that is, private lines which originate in the United States and terminate in the points listed in Attachment A or which originate in the points listed in Attachment A and terminate in the United States. In addition, Micronet may not -- and its tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. end or the points listed in Attachment A, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the points listed in Attachment A afford resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), *petitions for reconsideration pending.*

4. IT IS FURTHER ORDERED that neither Micronet nor any persons or companies directly or indirectly controlling or controlled by Micronet, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which Micronet or any persons or companies controlling or controlled by Micronet are parties.

5. IT IS FURTHER ORDERED the applicant shall file copies of any operating agreements, including the applicable accounting rate, it enters into with its foreign correspondents with the Commission within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file the semi-annual circuit reports pursuant to Section 63.16(b) of the Commission's Rules, 47 C.F.R. § 63.15(b).

9. IT IS FURTHER ORDERED that that portion of Micronet's application proposing the use of Intersputnik satellites IS DISMISSED without prejudice.

[1] Columbia Communications Corporation filed a petition to deny that portion of Micronet's application which proposed use of the Intersputnik satellite system. By letter dated June 1, 1994, Micronet requested that that portion of its application requesting use of Intersputnik satellites be deleted and that the Commission process the remaining portion of its application with respect to communications via the INTELSAT system.

10. This order is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

ATTACHMENT A

COUNTRIES TO BE SERVED VIA INTELSAT
(24 64 kbps equivalent circuits for private line voice and data services)[2/]

Atlantic Ocean Area Regions

Latin America

Antigua	Curacao	Netherlands Ant.
Argentina	Dominican Republic	Nicaragua
Aruba	Ecuador	Panama
Bahamas	El Salvador	Paraguay
Barbados	French Guiana	Peru
Belize	Grenada	St. Lucia
Bermuda	Guantanamo Bay	St. Vincent
Bolivia	Guatemala	Surinam
Brazil	Guyana	Trinidad & Tobago
Cayman Islands	Haiti	Turks & Caicos Isles
Chile	Honduras	Uruguay
Colombia	Jamaica	Venezuela
Costa Rica	Martinique	

Europe

Austria	Ireland	San Marino
Belgium	Italy	Slovenia
Croatia	Liechtenstein	Spain
Cyprus	Luxembourg	Sweden
Denmark	Malta	Switzerland
Finland	Monaco	Turkey
France	Netherlands	United Kingdom
Germany	Norway	Vatican
Greece	Portugal	Yugoslavia
Iceland		

2/ Note: The specific number of circuits required for specific countries will depend on MicroNet's customers.

ATTACHMENT A cont'd

Middle/Near East and Africa and Other Europe

Algeria	Gibraltar	Oman
Angola	Guinea	Pakistan
Armenia	Hungary	Poland
Ascension Isl.	Iran	Qatar
Azerbiajan	Iraq	Romania
Azores	Israel	Russian Federation
Bahrain	Ivory Coast	Saudi Arabia
Belarus	Jordan	Senegal
Benin	Kazakhstan	Sierra Leone
Botswana	Kenya	South Africa
Bulgaria	Kuwait	Sri Lanka
Burkina Faso	Kyrgyzstan	Sudan
Burma	Latvia	Swaziland
Cameroon	Lebanon	Syria
Canary Islands	Lesotho	Tajikistan
Cape Verde	Liberia	Tanzania
Central African Rep.	Libya	Togo
Chad	Lithuania	Tunisia
Congo	Madagascar	Turkmenistan
Czechoslovakia	Malagasy Rep.	United Arab Emirates
Diego Garcia	Malawi	Yemen
Egypt	Mali	Zaire
Estonia	Mauritania	Zambia
Ethiopia	Moldova	Zimbabwe
Gabon	Morocco	Uganda
Gambia	Mozambique	Ukraine
Georgia	Niger	Uzbekistan
Ghana	Nigeria	

RI192.01

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 93-1

In the Matter of

Amendment of Parts 2 and 15 to
Prohibit Marketing of Radio Scanners
Capable of Intercepting Cellular
Telephone Conversations

MEMORANDUM OPINION AND ORDER

Adopted: July 8, 1994; Released: July 19, 1994

By the Commission:

INTRODUCTION

1. By this action, the Commission denies a request by Kenwood Communications Corporation (Kenwood) for reconsideration of portions of the rules adopted in the *Report and Order* in this proceeding.[1] Those rules, which were adopted in response to the recently enacted Telephone Disclosure and Dispute Resolution Act (TDDRA), Pub. L. 102-556, generally prohibit the manufacture and importation of radio scanners capable of receiving cellular telephone communications. Kenwood seeks changes in the implementation dates for the rules, an exemption for scanners intended for use by certain parties and a relaxation of the definition of equipment that can be readily altered by the user. We find the rule changes requested by Kenwood to be inconsistent with either the intent or the specific provisions of the TDDRA.

BACKGROUND

2. As defined in Part 15 of our rules, scanning receivers, or "scanners," are radio receivers that can automatically switch between four or more frequencies within the 30-960 MHz band.[2] Historically, the Commission has regulated scanners only with respect to the radio noise that they inherently generate. As a result, many, but not all, currently-available models of scanners are able to receive communications in the Domestic Public Cellular Radio Telecommunications Service, *i.e.*, the cellular service, which uses frequencies in the 824-849 MHz and 869-894 MHz bands. In addition, several publications have described relatively simple modifications that users can make to enable other models of scanners to receive the cellular frequencies.

3. Section 403 of the TDDRA requires that the Commission adopt rules to prohibit the manufacture or importation of scanning equipment that can be used to intercept cellular telephone communications. This section requires the Commission to amend its Part 15 regulations to deny equipment authorization[3] to scanners capable of:

> - receiving transmissions in the frequencies allocated to the Domestic Public Cellular Radio Telecommunications Service;[4]
>
> - readily being altered by the user to receive transmissions in such frequencies; or,
>
> - being equipped with decoders that convert digital cellular transmissions to analogue voice audio.

Section 403(a) of the TDDRA also requires that the Commission prohibit the manufacture and importation of scanners that do not meet the new requirements beginning one year after the effective date of the amended rules.[5]

4. On April 19, 1993, the Commission adopted the *Report and Order* in this proceeding, implementing the requirements of the TDDRA. The rules became effective on April 26, 1993, and the manufacture and importation of scanning receivers that do not comply with the new rules will be prohibited as of April 26, 1994. The rules define scanners that can be readily altered by the user as:

> ... those for which the ability to receive transmissions in the cellular telephone bands can be added by clipping the leads of, or installing, a simple component such as a diode, resistor and/or jumper wire; replacing a plug-in semiconductor chip; or programming a semiconductor chip using special access codes or an external device, such as a personal computer.[6]

DISCUSSION

5. In its Petition for Reconsideration, Kenwood raises three issues. First, it argues that the deadlines for complying with the rules adopted in this proceeding should be extended because its product development cycle can often take several years. Second, it requests that scanners sold to Military Affiliate Radio Service (MARS) and Civil Air Patrol (CAP) licensees be exempt from the regulations adopted in this proceeding because MARS and CAP licensees, by virtue of their licenses, are already directly subject to Commission jurisdiction in the event that they illegally monitor cellular communications. Finally, it argues that the definition of "readily altered by the user" that was adopted in this proceeding should include only scan-

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[1] *See* Petition for Reconsideration filed by Kenwood Communications Corporation on May 14, 1993; *see also Report and Order*, ET Docket 93-1, 8 FCC Rcd 2911 (1993).

[2] *See* 47 CFR Section 15.3(v).

[3] In order to control their potential to cause harmful interference to authorized radio service, our Part 15 rules require that scanners receive an "equipment authorization" (certification) from the Commission prior to being marketed. *See* 47 CFR Sections 15.101(a) and 2.1031, *et seq.*

[4] The rules for the Domestic Public Cellular Radio Telecommunications Service are contained in Part 22 of the Commission's rules. *See* 47 CFR Part 22, Subpart K.

[5] *See Telephone Disclosure and Dispute Resolution Act, supra*, Section 403(a).

[6] See 47 CFR Section 15.121.

ners that can be modified "quickly" by "non-technical" consumers. There were no comments filed in response to the Kenwood petition. These issues, along with our findings and conclusions, are discussed below.

6. *Implementation dates.* Kenwood contends that the April 26, 1993, cutoff date for equipment authorization and the April 26, 1994, cutoff date for manufacture and importation of scanners that do not comply with the new rules do not provide sufficient time to design and build new products to replace those being prohibited. We recognize that the cutoff dates provide only a limited amount of time for transition of products to the new rules. This short period of time is, however, mandated by the TDDRA and reflects the position of Congress that reception of cellular communications by means of scanning receivers is a serious problem that must be resolved expeditiously. Accordingly, we are denying Kenwood's request for an extension of the cutoff dates for importation and manufacture of scanners that do not comply with the new rules.

7. *Exemption for equipment sold to MARS and CAP licensees.* Consistent with Section 403(c) of the TDDRA, the new rules exempt only scanners sold to cellular telephone service providers and federal, state and local governments from the cellular scanner prohibition.[7] Kenwood requests that we also exempt scanners modified at its factory for use by MARS and CAP licensees.[8]

8. Kenwood states that it manufactures two-way transceivers for licensees in various radio services, including land mobile, marine, and amateur users. Some of these transceivers contain scanning capability and, as such, are subject to the rules adopted in this proceeding. While the transceivers are generally set up to operate only on frequencies available within a particular radio service, Kenwood indicates that some of its transceivers are routinely modified at its factory to operate on additional frequencies, such as those used by MARS and CAP licensees, in order to accommodate the needs of its customers. Kenwood states that these factory modifications can result, incidentally, in the ability to scan cellular telephone frequencies. Kenwood argues that MARS and CAP licensees, by virtue of their license, are already directly subject to Commission jurisdiction in the event that they illegally monitor cellular communications, and that therefore there is no need to restrict its factory modifications.

9. We see no reason why it is not possible to manufacture equipment to operate on MARS and CAP frequencies without resulting in that equipment also having the capability to receive the cellular frequencies. MARS and CAP frequencies are far removed from the cellular frequencies.[9] Consequently, we find that there is no technical justification for exempting scanning equipment from the rules adopted in this proceeding based on its intended use by MARS or CAP licensees. Furthermore, although the TDDRA did exempt certain scanners from its requirements, as discussed above, it did not provide for exemptions such as that requested by Kenwood. We recognize that some manufacturers of existing equipment may find it difficult to block out cellular frequencies. However, while the restrictions we have adopted may make it somewhat more difficult and expensive to manufacture certain MARS and CAP equipment, we do not believe that the costs associated with complying with the TDDRA are so great as to justify creating an exemption for MARS and CAP equipment. Moreover, Kenwood's argument that we can take action against any Commission-issued license if the licensee is found to have violated federal law[10] ignores the intent and specific provisions of Section 403 of the TDDRA. Accordingly, we are denying Kenwood's request to exempt equipment sold to MARS and CAP licensees from the rules adopted in this proceeding.

10. *The definition of "readily altered by the user."* Section 403(a) of the TDDRA requires that the Commission deny equipment authorization to scanners capable of being "readily altered by the user." It does not, however, specify the characteristics of a scanner design that is "readily alterable." The only indication of the definition Congress intended for "readily alterable" is found in the legislative history of the TDDRA, where Congress expressed concern about scanners that can be modified by "cutting a single wire" or following the instructions in a "how-to" manual.[11] Based on this information, we proposed, and ultimately adopted, a definition of "readily altered by the user" that describes scanner designs like those found in "how-to" manuals currently on the market. Our definition of scanners that can be "readily altered by the user" reads as follows:

> Receivers capable of "readily being altered by the user" include, but are not limited to, those for which the ability to receive transmissions in the cellular telephone bands can be added by clipping the leads of, or installing, a simple component such as a diode, resistor and/or jumper wire; replacing a plug-in semiconductor chip; or programming a semiconductor chip using special access codes or an external device, such as a personal computer.[12]

11. Kenwood requests that we modify the definition of "readily altered by the user" to include only devices that can be quickly modified by "non-technical consumers."[13] It argues that our description of readily alterable devices does not provide adequate guidance to manufacturers because it only provides a few anecdotal examples, leaving the manufacturer to guess whether or not other designs would be considered "readily alterable."

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[7] Section 403(c) reads, "Effect on Other Laws. - This section shall not affect section 2512(2) of title 18, United States Code." See Telephone Disclosure and Dispute Resolution Act, *supra*, Section 403(a), and 18 U.S.C. Section 2512(2).

[8] MARS licenses are issued by the United States Department of Defense in accordance with the rules of the National Telecommunications and Information Administration. CAP licenses are issued by the Commission in accordance with the provisions of Part 87 of its rules.

[9] The MARS is used for long distance communication between military bases and often involves transmission of radio signals overseas. Consequently, the frequencies used by the MARS need to be below the UHF band, generally no higher than 150 MHz. In the event that there is a need for UHF MARS service, no allocation near the 902-928 MHz band would be acceptable because the military frequency allocations in that region are for radiolocation only. The highest frequency allocated for use by CAP licensees under the Commission's rules is 148.150 MHz. *See* 47 CFR Section 87.173.

[10] See 47 U.S.C. Section 303(m).

[11] See Congressional Record, statement of Senator Pressler, October 9, 1992, at S17121.

[12] See 47 CFR Section 15.121.

[13] *See* Kenwood petition at 7.

12. We believe that Kenwood's proposed definition would make it too easy to modify scanners. It was clearly Congress' intent to stop the manufacture and importation of cellular-blocked scanners that, once purchased by consumers, can be easily modified to receive cellular frequencies. Most of the examples given in our definition of scanners that can be "readily altered by the user" are modifications that perhaps could not be done by "non-technical consumers." Yet, they are examples of precisely the kind of easy modifications that we believe the TDDRA was intended to prohibit. While we appreciate Kenwood's concern that manufacturers may need more guidance on the definition, we do not believe that restricting "readily altered by the user" to include only quick changes made by "non-technical consumers" is appropriate. Nevertheless, to the extent that Kenwood, or any other manufacturer, has specific questions as to whether or how the rule applies to its particular product or situation, it may request an interpretation from our staff. Such inquiries are encouraged and, consistent with our longstanding policy regarding the Part 15 rules, we will allow our equipment authorization staff to interpret, on an ad hoc basis, how these rules will be applied. Accordingly, we are rejecting Kenwood's request.

ORDERING CLAUSES

13. In accordance with the above discussion and pursuant to the authority contained in Sections 4(i), 302 and 303 of the *Communications Act of 1934*, as amended, and the *Telephone Disclosure and Dispute Resolution Act*, IT IS ORDERED that the Petition for Reconsideration filed by Kenwood Communications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 92-255

In the Matter of

Amendment of Part 18 to Remove Unnecessary Regulations Regarding Magnetic Resonance Systems — RM-7903

REPORT AND ORDER

Adopted: June 13, 1994; Released: July 12, 1994

By the Commission: Commissioners Ness and Chong not participating

INTRODUCTION

1. By this action, the Commission amends Part 18 of its rules to remove regulations that unnecessarily increase the amount of time and money required to bring new non-consumer, medical magnetic resonance (MR) systems to market. These systems are used by medical professionals to study the molecular structure of a patient for diagnostic and monitoring purposes. This action addresses a petition for rule making filed by the National Electrical Manufacturers Association.

BACKGROUND

2. Part 18 of the rules sets forth requirements designed to minimize the potential for interference to radio and TV services from industrial, scientific and medical (ISM) equipment.[1] Such equipment generates radio frequency (RF) energy in order to perform a non-communications related function. Common examples of consumer ISM equipment include microwave ovens and RF lighting devices. Examples of non-consumer ISM equipment include industrial heaters, RF stabilized arc welders and magnetic resonance equipment. Before ISM equipment can be marketed in the United States, it must comply with the technical standards and equipment authorization procedures specified in Part 18.

3. On January 29, 1992, the National Electrical Manufacturers Association (NEMA) filed a petition for rule making requesting that Part 18 of the Commission's rules be amended to exempt medical MR systems from the Part 18 technical standards and authorization requirements.[2] Medical MR systems generate radio signals, typically in the HF or low VHF range, below 64 MHz, in order to produce images of body organs. NEMA stated that medical MR systems pose little risk of interference. It noted that MR systems must be capable of detecting very weak radio signals. Therefore, MR systems are shielded against outside radio noise. This same shielding prevents radiation of the radio signals generated by MR systems to the outside environment. NEMA stated that it was unaware of any reported instances of interference caused by MR systems. NEMA argued that the required testing is costly and disruptive because it must of necessity be performed in a hospital or health care facility. NEMA noted that in 1986, under similar circumstances, the Commission exempted medical ultrasonic equipment from Part 18 technical standards and authorization requirements.[3]

4. On November 4, 1992, we adopted a *Notice of Proposed Rule Making* (*Notice*) proposing to exempt MR systems from the Part 18 technical standards and authorization requirements.[4] In the *Notice*, we tentatively concluded that the cost of our technical standards and authorization requirements for MR systems were unwarranted given the low risk of interference.

5. Six parties filed comments in response to the *Notice*;[5] NEMA filed the only reply comment. Except for Maximum Service Television, Inc. (MSTV), the commenting parties fully support our proposal regarding MR systems. In its comments, MSTV indicates that it does not oppose this proposal. However, MSTV expresses concern about the potential for an overall increase in noise in the television broadcast bands, and asks that we undertake a comprehensive examination of the issue of unintentional electromagnetic emissions that cause interference to broadcast services.

DISCUSSION

6. We continue to believe that the cost of our technical standards and equipment authorization requirements for medical MR systems are unwarranted given the low risk of interference. As discussed in the *Notice*, it appears that MR systems pose little risk of interference to radio communications because of the way they are designed and installed. It also appears that there are relatively few installations of MR systems (under 1000), and in the event that measures need to be taken to correct interference, the location of the MR systems are known.[6] Compliance with the technical

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[1] *See* 47 CFR Section 18.101, *et seq.*

[2] *See* Petition for Rule Making of the Magnetic Resonance Section of the National Electrical Manufacturers Association, RM-7903. MR systems must currently comply with technical standards that limit the radio frequency energy that is radiated from the system or conducted onto the electrical power line. *See* 47 CFR. Sections 18.305 and 18.307. MR Systems are also subject to verification of compliance by the manufacturer. *See* 47 CFR Section 18.203(b). Under the verification requirement, the manufacturer must test the product, retain a copy of the test report and place a label on the product. *See* 47 CFR Section 2.902. Submittal of information to the Commission is required only upon request.

[3] See *Report and Order*, General Docket No. 85-303, 1 FCC Rcd 553 (1986).

[4] See *Notice of Proposed Rule Making*, ET Docket No. 92-255, 7 FCC Rcd 7945 (1992).

[5] Comments were filed by Advanced NMR Systems, Inc.; American College of Radiology; General Electric Medical Systems; Hitachi Medical Systems of America, Inc.; Maximum Service Television,Inc.; and Siemens.

[6] U.S. Food and Drug Administration rules require manufacturers to maintain a product locator file for MR systems.

standards and equipment authorization requirements of Part 18 are burdensome and costly for the manufacturers of MR systems. Given the low volume production of medical MR systems, this can significantly affect the unit cost of each system, contributing to the increasing costs of medical care.

7. We agree with NEMA that the circumstances presented here are similar to those that led us earlier to exempt non-consumer medical ultrasonic equipment from Part 18 technical standards and equipment authorization requirements. We are unaware of any interference that has resulted from the medical ultrasonic equipment exemption, and do not expect interference to result from the similar exemption of MR systems.

8. We appreciate MSTV's concerns about the noise levels in the TV bands. However, we have no evidence or other information suggesting that the changes proposed in the *Notice* are likely to raise those noise levels or, more importantly, to cause interference to television reception.[7] Regarding MSTV's request that we take a comprehensive look at television interference in general, such a study is beyond the scope of this proceeding.

9. Accordingly, we are amending Sections 18.107 and 18.121 of our rules as proposed in the *Notice*. We will continue to apply the requirement of Section 18.111(b) that operators of medical MR systems correct any harmful interference that may occur.[8]

PROCEDURAL MATTERS

10. *Final Regulatory Analysis.* Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. Need and purpose of this action:

The rule changes adopted in this Report and Order exempt MR systems from the technical standards and authorization requirements in Part 18. Given the small risk of interference being caused to communications by MR systems, compliance with the existing technical standards and equipment authorization requirements is unnecessarily burdensome.

II. Summary of the issues raised by the public comments in response to the Initial Regulatory Flexible Analysis:

There were no comments submitted in response to the Initial Regulatory Flexible Analysis.

III. Significant alternatives considered.

The Commission has considered retaining the existing rules; however, in adopting these changes we are ensuring that our regulations do not unduly burden the industry and at the same time are providing adequate protection to the other users of the spectrum.

ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that pursuant to the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, Part 18 of the Communications Rules and Regulations IS AMENDED as set forth in the Appendix below. These Rules and Regulations are effective [30 days after publication in the Federal Register]. IT IS FURTHER ORDERED THAT this proceeding IS TERMINATED.

12. For further information on this proceeding, contact Errol Chang, Technical Standards Branch, Office of Engineering and Technology, telephone 202-653-7316.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

Part 18 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 18 - INDUSTRIAL, SCIENTIFIC, AND MEDICAL EQUIPMENT

1. The authority citation for Part 18 continues to read as follows:

AUTHORITY: 47 U.S.C. 4, 301, 302, 303, 304, and 307.

2. Section 18.107 is revised by adding a new paragraph (j) to read as follows:

Section 18.107 Definitions.

* * * * *

(j) *Magnetic resonance equipment.* A category of ISM equipment in which RF energy is used to create images and data representing spatially resolved density of transient atomic resonances within an object.

3. Section 18.121 is revised to read as follows:

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[7] Although MR systems operate on frequencies that include television channels 2 and 3, MSTV states that "it would not appear that MR devices, standing alone, are likely to cause significant interference with broadcast television operations." MSTV comments at 2.

[8] In addition, Sections 18.105, 18.109 through 18.119, 18.301 and 18.303 will apply to MR systems. These sections cite other rule parts relating to the authorization and operation of ISM equipment; general technical operating and importation requirements; and frequencies available for ISM use. Although the *Notice* did not specifically propose to apply Section 18.301 to MR systems and other Part 18 exempt equipment, it is obvious that Section 18.301 in fact does apply because it specifies the frequencies on which ISM equipment may operate. Accordingly, we are amending Section 18.121, which specifies the requirements for exempt equipment, to make this clear.

Section 18.121 Exemptions.

Non-consumer ultrasonic equipment, and non-consumer magnetic resonance equipment, that is used for medical diagnostic and monitoring applications is subject only to the provisions of Section 18.105, Sections 18.109 through 18.119, Section 18.301 and Section 18.303 of this Part.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-75

In the Matter of

Amendment of Section 73.202(b) RM-8483
Table of Allotments,
FM Broadcast Stations.
(Casper, Wyoming)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 21, 1994; Released: July 19, 1994

Comment Date: September 12, 1994
Reply Comment Date: September 27, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Bruce L. Erickson ("petitioner"), proposing the allotment of Channel 247A at Casper, Wyoming, as that community's fifth local commercial FM transmission service. Petitioner states that he will apply for the channel, if allotted.

2. In support of the proposal, petitioner states that Casper is located in Natrona County and has a 1990 U.S. Census population of 46,742. Petitioner also states that Casper is presently served by eight local stations and that the proposed allotment will advance the objectives of Section 307(b) of the Communications Act of 1934, as amended, and the Commission's FM allocations policies.

3. We believe the public interest would be served by requesting comments regarding the allotment of Channel 247A to Casper, Wyoming, since it could provide the community with its fifth local commercial FM transmission service. An engineering analysis has determined that Channel 247A can be allotted to Casper in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Casper, Wyoming	233C, 238C, 279C, 295C	233C, 238C, 247A, 279C, 295C

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **September 12, 1994**, and reply comments on or before **September 27, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Bryan Cave, Esq.
700 13th Street, N.W., Suite 600
Washington, D.C. 20005-3960
(Counsel for Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 247A at Casper are North Latitude 42-50-48 and West Longitude 106-18-48.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-33

In the Matter of

Amendment of Section 73.202(b),	RM-8160
Table of Allotments,	RM-8233
FM Broadcast Stations.	
(Oakhurst, Firebaugh and *June Lake*, California)[1]	

SECOND REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 28, 1994; Released: July 19, 1994

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is the *Further Notice of Proposed Rule Making*, 9 FCC Rcd 655 (1994), issued in response to a request filed by Don Stewart ("petitioner") proposing the allotment of FM Channel 226A to June Lake, California, as that community's first local aural service. Petitioner failed to file comments in response to the *Notice*,[2] and no other comments were received.

2. As stated in the *Notice*, a showing of continuing interest is required before a channel will be allotted. In the absence of such an expression of interest, it is the Commission's policy to refrain from allotting a channel. As a result of petitioner's failure to respond to the *Notice*, the request to allot Channel 226A to June Lake, California, will be dismissed. *See Gilman, Illinois*, 6 FCC Rcd 2197 (1991), and paragraph 2 of the Appendix to the *Notice*.

3. Accordingly, IT IS ORDERED, That the request of Don Stewart (RM-8233) proposing the allotment of FM Channel 226A to June Lake, California, IS DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] In a separate *First Report and Order* in this proceeding, 9 FCC Rcd 653 (1994), the Commission resolved the rule making request concerning Oakhurst and Firebaugh, California (RM-8160).

[2] The *Notice* requested petitioner to provide sufficient information to demonstrate that June Lake qualifies as a community for allotment purposes since it is not listed in the U.S. Census. Additionally, petitioner was requested to rectify various procedural deficiencies in the proposal in the context of his comments.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Kingdon R. Hughes, Station WPCT 968,
and Jean M. Warren, Station WPCU 518

Request for Extension of Time
to construct and operate
nationwide, commercial
220-222 MHz Land Mobile Systems

ORDER

Adopted: July 8, 1994; Released: July 19, 1994

By the Deputy Chief, Licensing Division, Private Radio Bureau:

1. On May 12, 1994, Kingdon R. Hughes and Jean M. Warren filed a request for an extension of time to meet the first of four benchmark construction deadlines relating to their nationwide 220-222 MHz land mobile systems. The Commission's rules allow the licensees ten years to construct their nationwide systems, and require licensees to meet specific benchmarks at two, four, six and ten years. 47 C.F.R. § 90.725. Because the Commission's Report and Order promulgating regulations for the use of the 220-222 MHz band by land mobile users was the subject of a U.S. Court of Appeals case that placed a cloud over their license grants,[1] the licensees now request that the two year benchmark requirement contained in 47 C.F.R. § 90.725(a)(1) be extended until March 31, 1996.[2] For the reasons that follow, the requested extension of the two year benchmark is granted.

2. The Commission, by Public Notice, granted an extension of the construction deadline for local 220-222 MHz licensees due to the uncertainty created by the U.S. Court of Appeals action. *Public Notice*, 57 Fed. Reg. 41935, 41936 (September 14, 1992). After the dismissal of the *Evans* case, the deadline was further extended due to equipment availability problems. *Amendment of Part 90 of the Commission's Rules To Provide For the Use of the 220-222 MHz Band by the Private Land Mobile Services*, 9 FCC Rcd 1739 (1994). Similar uncertainty and equipment availability problems have hindered the nationwide licensees' efforts to construct their systems.

3. The request by these nationwide licensees is limited to the first benchmark. The other benchmarks remain the same.[3] In light of the relief afforded to the local 220-222 MHz licensees, and good cause shown, the limited relief sought by these licensees is justified.

4. For the above reasons, IT IS ORDERED THAT the date by which Kingdon R. Hughes and Jean M. Warren must meet the two year benchmark requirement, 47 C.F.R. § 90.725(a)(1), is extended until March 31, 1996.

FEDERAL COMMUNICATIONS COMMISSION

W. Riley Hollingsworth
Deputy Chief, Licensing Division

[1] Evans v. Federal Communications Commission, Case No. 92-1317 (D.C. Cir. filed July 30, 2992).

[2] This date is approximately two years from the order dismissing the *Evans* case. Order, Per Curiam, Evans v. Federal Communications Commission, Case No. 92-1317 (D.C. Cir. March 18, 1994).

[3] Both Hughes' license and Warren's license were granted on July 29, 1993. The licensees' four, six and ten year deadlines follow from these grant dates.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Jackson, Alabama)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: June 23, 1994; Released: July 19, 1994

By the Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for reconsideration filed on behalf of Radio Station WHOD, Inc. ("WHOD, Inc."), licensee of Station WHOD(FM), Jackson, Alabama, of a staff letter returning as unacceptable its petition for rule making.[1] WHOD, Inc. requested substitution of Channel 233C2 for Channel 233C3 at Jackson, Alabama, and modification of its license for Station WHOD(FM) to specify operation on the higher class channel.

2. WHOD, Inc. filed a counterproposal in MM Docket 91-303 requesting substitution of Channel 233C2 for Channel 233C3 at Jackson and modification of its license for Station WHOD(FM).[2] *See* 6 FCC Rcd 6012 (1991). The counterproposal was acceptable as WHOD, Inc. specified a site for Channel 233C2 which was consistent with the Commission's spacing requirements. In a *Report and Order* in MM Docket No. 91-303, adopted June 23, 1994, we granted WHOD Inc.'s upgrade request. Therefore, WHOD Inc.'s petition for reconsideration is now moot.

3. In view of the above, IT IS ORDERED, That the petition for reconsideration filed by WHOD, Inc. IS HEREBY DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

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[1] Public notice was given on December 11, 1991, Report No. 1869.

[2] Public notice of the counterproposal was given on May 22, 1992, Report No. 1892 (RM-7997).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcasting Stations.
(Various Locations)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 24, 1994; Released: July 19, 1994

By the Acting Chief, Allocations Branch:

1. This *Order* amends Section 73.202(b) of the Commission's Rules, the Table of FM Allotments, to specify the classes of channels allotted to various communities. These amendments are necessary to reflect changes that have been authorized in response to applications filed by licensees and permittees operating on these channels. This action is taken pursuant to *Revision of Section 73.3573(a)(1) of the Commission's Rules Concerning the Lower Classification of an FM Allotment*, 4 FCC Rcd 2413 (1989), and the *Amendment of the Commission's Rules to Permit FM Channel and Class Modifications [Upgrades] by Application*, 8 FCC Rcd 4735 (1993). The attached Appendix shows the Table, as amended for those communities.

2. This action constitutes an editorial change in the Table of FM Allotments. Therefore, a public notice and comment proceeding is unnecessary. *See* 5 U.S.C. 553(b)(A) and (B).

3. For further information concerning this proceeding, contact Sloan B. Gregory, Mass Media Bureau. (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

Community	Channel Deleted	Channel Added
Demopolis, Alabama	293C2	293C3
Sheffield, Alabama	292C2	292C3
Tuscaloosa, Alabama	288C3	288A
Anchorage, Alaska	267C	267C2
Anchorage, Alaska	298C	298C1
Lake Havasu City, Arizona	266C	266C3
Batesville, Arkansas	226C	226C1
Mena, Arkansas	271C2	271C3
Bakersfield, California	257A	257B1
Carnelian Bay, California	279C2	279C1
Fortuna, California	262C2	262C3
Orland, California	294B1	294B
Pueblo, Colorado	283C1	283C2
Trinidad, Colorado	223C	223C1
Coral Cove, Florida	300A	300C2
Live Oak, Florida	251C1	251C2
Tampa, Florida	264C1	264C
Haliimaile, Hawaii	288C	288A
Preston, Idaho	244A	244C1
Winterset, Iowa	258C3	258A
Greenville, Kentucky	228C2	228C3
Lake Charles, Louisiana	258C	258C1
Larose, Louisiana	262C1	262C2
Westbrook, Maine	265A	265B1
Staples, Minnesota	234A	234C3
Tracy, Minnesota	286C3	286C2
Winona, Minnesota	266A	266C3
Tupelo, Mississippi	253C	253C1
Springfield, Missouri	247C	247C1
St. Joseph, Missouri	286C	286C1
Butte, Montana	224A	223C1
East Helena, Montana	281C	281C1
Libby, Montana	269C3	269A
Reno, Nevada	269A	269C3
Plattsburgh, New York	286A	286C3
Columbia, North Carolina	289C	289C1
Moyock, North Carolina	221B1	221C3
Wilmington, North Carolina	247C	247C1
Fargo, North Dakota	270C	270C1
Corvallis, Oregon	268C	268C2
Charleston, South Carolina	278C	278C1
Ravenel, South Carolina	269C2	269C3
Murfreesboro, Tennessee	242C	242C1

Beaumont, Texas	236C	236C1
Canyon, Texas	300C	300C1
Clarksville, Texas	253A	253C3
Odessa, Texas	250C	250C1
Odessa, Texas	256C	256C1
Nephi, Utah	280C	280C1

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Atlantic Telephone Companies — Transmittal No. 634

Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: May 27, 1994; Released: May 31, 1994

By the Acting Chief, Tariff Division, Common Carrier Bureau:

1. On June 9, 1993, the Commission released the *BNA Order*,[1] requiring local exchange carriers (LECs) to file tariffs for the provision of billing name and address information (BNA) to telecommunications service providers. The Commission specified that LECs were required to file tariffs for the provision of BNA information of customers with listed telephone numbers on or before September 8, 1993,[2] and in later Orders, specified that tariffs for the provision of BNA associated with unlisted or nonpublished telephone numbers were to be filed on February 23, 1994.[3] The LECs' tariffs for the provision of "listed" BNA have already taken effect.[4]

2. On February 18, 1994, the Bell Atlantic Telephone Companies (Bell Atlantic) filed a tariff for "unlisted" BNA. American Telephone and Telegraph Company (AT&T) and MCI Telecommunications Corporation (MCI) filed petitions to reject or suspend and investigate the Bell Atlantic tariff on March 7, 1994.[5]

3. MCI claims that Bell Atlantic seeks exogenous treatment of the costs of providing notification to unlisted customers.[6] MCI observes that BNA costs are not included in the list of exogenous cost categories specified in Section 61.45(d) of the Commission's Rules, 47 C.F.R. § 61.45(d). MCI also maintains that, in the absence of a rule change or an explicit Commission decision permitting or requiring exogenous treatment of a particular cost, LECs seeking such treatment must file a petition for rulemaking or waiver.[7]

4. AT&T claims that Bell Atlantic's BNA tariff violates the BNA rules by prohibiting BNA disclosure for 1+ calls and 10XXX 1+ calls where those end users have requested that their BNA not be disclosed. AT&T also asserts that this tariff would prohibit disclosure of unlisted BNA for these calls even if those customers have subscribed to an AT&T calling plan.[8] Bell Atlantic responds that tariff provisions restricting disclosure of BNA of customers who have requested that their BNA not be disclosed is required by the Commission's Rules.[9] Bell Atlantic asserts that more than 8000 of its subscribers have demanded that their BNA not be released, and that these subscribers would probably be opposed to BNA disclosure for 10XXX calls.[10]

5. AT&T also contends that, without disclosure of BNA for 1+ and 10XXX calls, it is exposed to a risk of fraud or uncollectible charges. AT&T claims there is no way to check for the availability of BNA for 1+ and 10XXX calls analogous to the Line Information Database (LIDB) for calling card, collect and third party calls.[11] AT&T also criticizes Bell Atlantic's tariff for not stating whether it will block the 1+ and 10XXX calls of customers for which BNA is not available.[12] AT&T further notes that unlisted BNA tariffs filed by other carriers are limited to calling card, third party and collect calls.[13] Bell Atlantic denies

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[1] Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, CC Docket No. 91-115, Second Report and Order, 8 FCC Rcd 4478 (1993) (*BNA Order); on recon.*, Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, Reconsideration and Petitions for Stay, CC Docket No. 91-115, 8 FCC Rcd 6393 (*First BNA Reconsideration Order), on further recon.* 8 FCC Rcd 8798 (1993) (*Second BNA Reconsideration Order), recon. pending.*

[2] *BNA Order*, 8 FCC Rcd at 4487 (para. 45).

[3] In the *First Reconsideration Order*, the Commission extended to February 9, 1994, the deadline for filing tariffs for the provision of the BNA information of customers with nonpublished or unlisted telephone numbers. *First Reconsideration Order*, 8 FCC Rcd at 6393 (para. 3). In the *Second Reconsideration Order*, this deadline was further extended to February 23, 1994. *Second BNA Reconsideration Order*, 8 FCC Rcd at 8810 (para. 69).

[4] *See* Billing Name and Address Tariffs of Local Exchange Carriers, Memorandum Opinion and Order, 8 FCC Rcd 8211 (Com. Car. Bur., Tariff Div. 1993); Nevada Bell, Revisions to Tariff F.C.C. No. 1, Pacific Bell, Revisions to Tariff F.C.C. No. 128, Order, 9 FCC Rcd 351 (Com. Car. Bur., Tariff Div. 1994). For purposes of this Order, we refer to the BNA associated with customers with listed telephone numbers as "listed BNA," and the BNA associated with customers with unlisted or nonpublished telephone numbers as "unlisted BNA."

[5] On March 10, 1994, AT&T and MCI also filed petitions to reject or suspend and investigate unlisted BNA tariffs filed by other LECs. Those tariffs, which have already taken effect, were addressed in separate Orders. Billing Name and Address Tariffs of Local Exchange Carriers for Subscribers with Unlisted or Nonpublished Telephone Numbers, DA 94-400 (Com. Car. Bur., Tariff Div., released Apr. 22, 1994); Pacific Bell, Revisions to Tariff 8F.C.C. No. 128, DA 94-401 (Com. Car. Bur., Tariff Div., released Apr. 22, 1994). *See also* Anchorage Telephone Utility, Revisions to Tariff F.C.C. No. 5, DA-94-460 (Com. Car. Bur., Tariff Div., released May 6, 1994).

[6] MCI Petition at 1-3.

[7] *Id.* at 4-5, *citing* Petition for Waiver of the Commission's Rules to Recover Network Depreciation Costs, 9 FCC Rcd 377 (1993) (*United Network Depreciation Order*). On May 24, 1994, Bell Atlantic informed the Tariff Division that it is withdrawing the exogenous cost treatment of which MCI complains, and recalculated its price cap indices accordingly. *See* Letter from Maureen Keenan, Bell Atlantic, to Chief, Tariff Division, Common Carrier Bureau, Federal Communications Commission, May 24, 1994 (*May 24 Letter*).

[8] AT&T Petition at 1-4.

[9] Bell Atlantic Reply at 2, *quoting* Section 64.1201(e)(3) of the Commission's Rules, 47 C.F.R. § 64.1201(e)(3).

[10] *Id.* at 3. Nevertheless, Bell Atlantic also states that it will provide the BNA of customers who have requested that their BNA not be disclosed to AT&T if the Commission determines that it is appropriate. *Id.* at 2-3.

[11] AT&T Petition at 3-5.

[12] *Id.* at 5-6.

[13] *Id.* at 6-7.

that withholding the BNA of subscribers who have requested that their BNA not be disclosed subjects AT&T to a risk of fraud.[14] Bell Atlantic also argues that LECs cannot distinguish between calling card, third party, and collect calls and other calls, and so they must restrict BNA disclosure of all end users who have requested that their BNA not be disclosed to remain in compliance with the BNA Rules. [15]

6. We have reviewed the BNA tariff and revision filed by Bell Atlantic, as well as all associated pleadings. We conclude that, as revised, Bell Atlantic's tariff is not so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.[16].

7. Accordingly, IT IS ORDERED that the petitions for rejection or suspension and investigation filed by American Telephone and Telegraph Co. and MCI Telecommunications Corporation, against the transmittal captioned above, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

David A. Nall
Acting Chief, Tariff Division
Common Carrier Bureau

[14] Bell Atlantic Reply at 2 n.5, 3 n.6, 4.
[15] *Id.* at 3-4.
[16] We note that several of the issues raised with respect to these tariffs are also raised in a petition for reconsideration of the *Second BNA Reconsideration Order*. Nothing in this Order should be interpreted to decide or otherwise prejudge these issues.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Rule Interpretation and Waiver Requests for the Auction of Ten Nationwide Narrowband Personal Communication Service Licenses	Auction No. 1, FCC Form 175 File No. AUC-1

ORDER

Adopted: July 11, 1994; Released: July 11, 1994

By the Deputy Chief (Operations), Common Carrier Bureau:

1. By Public Notice issued May 23, 1994, 59 Fed. Reg. 28097 (May 31, 1994), we announced that the auction for ten nationwide narrowband Personal Communication Service (PCS) licenses would take place beginning July 25, 1994 and called for the submission of applications on FCC Form 175 to participate in this auction no later than July 1, 1994. Sixty seven applicants submitted Form 175 applications. We dismissed two applications as unacceptable for filing, and the remainder we either accepted for filing or asked applicants to supplement or amend their application in some manner. *See* Public Notice released July 5, 1994 announcing the status of applications received for the ten nationwide narrowband PCS licenses to be auctioned beginning July 25, 1994 at the Omni Shoreham Hotel, Washington, D.C. ("July 5 Public Notice").

2. In the July 5 Public Notice, we observed that a number of applicants had submitted requests for rule interpretations or waiver requests along with their Form 175s. We stated that the Commission would shortly issue an Order either 1) declining to rule on those requests unless or until those applicants were winning bidders or 2) granting or denying the requested rule waivers or interpretations. The following applicants whose applications were accepted for filing made such requests:

Advanced Wireless Communications, Inc.

CellNet Data Systems, Inc.

Metrocall, Inc.

United States Paging Corporation

Westlink Licensee Corporation

3. The following applicants whose applications were deemed incomplete and who were asked to file additional information also made such requests:

Edward M. Johnson

Integrated Wireless Marketing and Technology Partners, L.P.

PageMart II, Inc.

4. With the exception of Mr. Edward M. Johnson, all of the waiver and rule interpretation requests involved those rules for narrowband PCS application processing concerning the affiliate disclosure requirements (Section 24.413), the rules governing changes in ownership after filing of Form 175 (Section 24.422) and related rules. Mr. Johnson, on the other hand, requests that the Commission waive the requirement that he submit an upfront deposit by July 11, 1994 so that he might participate and bid in this auction without making a monetary deposit of any kind to the Commission in this auction.[1]

5. We will rule only on Mr. Johnson's waiver request at this time. We will hold the auction of the nationwide narrowband PCS licenses in two weeks, and the waiver and rule interpretation requests raised by applicants other than Mr. Johnson raise complex policy issues. The Commission has never before exercised its auction authority under Section 309(j) of the Communications Act, which was only enacted last year. It has not had the opportunity to interpret these rules, and there is little precedent to guide us in this area. Inasmuch as there is no guarantee that any of these applicants will be the winning bidders in the upcoming auction, we see no need to rule on their requests unless and until they are winning bidders. If the requesters do not win a license at auction, their request is moot. Additionally, we are reluctant to rule on these requests when there is insufficient time to permit the receipt of comments and replies from the public on the question of whether a grant of the various requests would serve the public interest.

6. Mr. Johnson's waiver request, however, raises different concerns. He asserts that the Commission's auction procedures are outside the scope of authority granted by Congress. He argues, among other things, that the Commission's auction procedures for this auction are flawed because of the complexity of the simultaneous ascending bid auction methodology to be used in this auction, the alleged prohibition of publicly traded corporations from participating in the auction, and the Commission's failure to begin issuing PCS licenses within the statutory time limit imposed by Congress. Of all of his arguments, however, the only one that appears relevant to his request for waiver of the upfront payment requirement is that the Commission has no authority to impose upfront deposits two weeks before there is any auction conducted and before any mutual exclusivity of applications is determined. Waiver request at 2.

7. We reject Mr. Johnson's claim that mutual exclusivity among applications does not exist. The Commission has received 67 applications seeking nationwide narrowband

[1] By Public Notice dated May 23, 1994, Report No AUC-94-01, Auction No. 1 ("May 23 Public Notice"), the Commission required the submission by July 11, 1994 of an upfront payment of $350,000 for each license on which an applicant expected to bid in this auction. This requirement was reiterated in the Procedures, Terms and Conditions section of the Bidder's Information Package for this auction.

PCS licenses and to participate in the auction. Of these, 15 have been found acceptable for filing. Of these 15, 14 have indicated their intent to bid on any of the ten available licenses. One intends to bid on Frequency Block Numbers 5, 8, and 11. It therefore appears that mutual exclusivity already exists between these 15 applicants. We expect other applicants to submit perfecting amendments to their incomplete applications, and it appears very likely that additional mutually exclusive applications will be filed. *See* July 5 Public Notice.

8. We also disagree with Mr. Johnson's assertion that the use of upfront payments, even those of substantial amounts, is unauthorized by Congress. In the Notice of Proposed Rulemaking (NPRM) in Docket No. 93-253, 8 FCC Rcd 7635 (1993), the Commission noted at para. 96 that Section 309(j) requires that no party may participate in an auction "unless such bidder submits such information and assurances as the Commission may require to demonstrate that such bidder's application is acceptable for filing." In response to this mandate, the NPRM noted the importance of limiting bidding to serious qualified bidders and proposed the adoption of a refundable upfront payment by bidders to the Commission as a prior condition of participating in the auction. In the Second Report and Order in Docket No. 93-253, FCC 94-61, released April 20, 1994, the Commission, with substantial support from the commenters, adopted a general requirement for upfront payments. In fact, Mr. Johnson in his comments in response to the NPRM supported upfront payments ranging between $10,000 and $1 million for some auctions. *See* comments of Edward M. Johnson in PP Docket No. 93-253 at 3.

9. The Third Report and Order in Docket No. 93-253, FCC 94-98, released May 10, 1994 and the associated Procedures, Terms and Conditions for this auction implemented the general principles governing upfront payments that were established in the Second Report and Order. In the Third Report and Order, the Commission reiterated the need for a refundable upfront payment payable to the Commission prior to the auction in order to ensure that only serious, qualified bidders participate in the nationwide narrowband PCS auction.[2] It also set the upfront payment in accordance with the standard $.02 per MHz per pop formula established in the Second Report and Order. *See* FCC 94-98 at para. 45. The May 23 Public Notice and the Procedures, Terms and Conditions in the Bidder's Information Package for the nationwide narrowband auction calculated this amount and established the minimum upfront payment for this auction as $350,000.

10. The Commission's belief in the need for upfront payments has been consistent and clear throughout the proceedings in Docket 93-253. Grant of a waiver to Mr. Johnson would clearly undermine the purpose of the rule requiring upfront payments, for it would rob the Commission of the certainty that the bidder is serious and qualified. *See WAIT Radio* v. *FCC*, 418 F.2d 1203, (D.C. Cir), *cert. denied* 409 U.S. 1207 (1972). It would also prevent the Commission from having any ready financial recourse to a bidder who defaulted and damaged the auction process; a bidder could deliberately bid meaningless and unreasonable sums with impunity to the great disadvantage of other serious bidders, contrary to the intent of Congress. Finally, Mr. Johnson has articulated no special circumstances that would justify granting a waiver in his case. Rather, his pleading amounts to a request for reconsideration of the upfront payment requirement.[3] Waiver is clearly not warranted.

11. Therefore, IT IS ORDERED, that the request for waiver of the upfront payment requirement in the auction for nationwide narrowband PCS licenses to be held beginning July 25, 1994 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Common Carrier Bureau

[2] In addition to serving as a means of verifying the seriousness of a bidder, upfront payments also serve as a source of funds for the penalties which apply if a bidder defaults or is disqualified during or after the auction. *See* Sections 1.2104(g), 1.2109 and 24.308 of the Rules.

[3] Mr. Johnson asserts that he has pending before the Commission a Petition for Reconsideration of the Commission's actions in PP Docket No. 93-253. However, the Commission's files contain no record of such a filing by Mr. Johnson.

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 92-191

In the Matter of

Amendment of Section 2.106 of the Commission's Rules to Upgrade to Primary Status the Secondary Mobile-Satellite Service Allocation at 19.7-20.2 GHz and 29.5-30 GHz	RM-7511

REPORT AND ORDER

Adopted: June 13, 1994; Released: July 13, 1994

By the Commission: Commissioners Ness and Chong not participating.

INTRODUCTION

1. By this action, we are amending the Table of Frequency Allocations to upgrade the status of the Mobile-Satellite Service (MSS) allocation at 19.7-20.2 GHz and 29.5-30 GHz (20/30 GHz) from secondary to primary. We also are adopting related amendments to our rules to implement decisions made by the International Telecommunication Union's (ITU) 1992 World Administrative Radio Conference (WARC-92).[1] These actions will increase the variety of services that satellite operators may provide using this spectrum without impairing any existing services in these bands.

BACKGROUND

2. Traditionally, both the Commission on the domestic level and the ITU on the international level have allocated frequency bands for satellite communications based on the classification of services to be provided.[2] As a result of these separate allocations, different services generally are provided from separate dedicated satellites. In certain situations the Commission has permitted in-orbit satellites to provide nonconforming services when it was technically feasible to do so and interference was unlikely to be caused.[3]

3. More recently, the Commission has recognized the industry's increasing tendency to develop and implement space platforms that integrate a variety of services.[4] At WARC-92 the United States proposed that the 20/30 GHz bands be reallocated for a general-satellite service, which would have included fixed and mobile satellite applications. WARC-92 did not adopt the proposal for a general-satellite service, but in the 20/30 GHz band did upgrade the MSS allocation from secondary to primary, to be shared with the fixed-satellite service (FSS).[5]

4. On July 16, 1990, Norris Satellite Communications, Inc. (Norris) submitted a Petition for Rule Making, RM-7511, requesting that the 20/30 GHz bands be reallocated for a general-satellite service that would include fixed, mobile, and broadcast applications. These bands currently are allocated to FSS on a primary basis, with a secondary allocation for MSS.[6] In its petition, Norris argued that the 20/30 GHz allocation should be more flexible and permit a wide variety of satellite services.

5. On August 14, 1992, the Commission adopted a *Notice of Proposed Rule Making* (*Notice*) proposing to upgrade the existing domestic MSS allocation in the 20/30 GHz bands from secondary to primary.[7] This action was in response to the Norris petition and the decisions of WARC-92 regarding these bands.[8] The Commission also requested comment on a suggestion submitted by the National Aeronautics and Space Administration (NASA) that the 20/30 GHz bands be partitioned and separate technical standards be adopted for each part, so that systems with significantly different antenna gains and modulation techniques could be accommodated in a spectrum efficient manner. Comments were filed by Norris and TRW, Inc. (TRW) and reply comments by Calling Communications Corporation (Calling) and Endgate Technology Corporation (Endgate).

DISCUSSION

MSS Upgrade

6. In the *Notice*, the Commission concluded that upgrading the secondary MSS allocation to shared primary status with FSS would promote the most efficient use of this spectrum. It stated that a multi-service allocation would allow expanded opportunities for other satellite services, promote development of satellite services in the 20/30 GHz band, and enable satellite operators to respond flexibly to

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[1] *See Final Acts of the World Administrative Radio Conference*, Malaga-Torremolinos, 1992 (*Final Acts*).

[2] *See* 47 C.F.R. § 2.102(a) and Articles 6 and 8 of the ITU Radio Regulations.

[3] *See, e.g., Order and Authorization*, 2670-DSE-MISC-88, 4 FCC Rcd 4538 (1989), at paragraph 6, authorizing Geostar Positioning Corporation to operate a transmission link in the FSS 4/6 GHz bands to provide radiodetermination satellite service to receive-only user terminals.

[4] *See, e.g., Notice of Proposed Rule Making*, GEN Docket No. 90-56, 5 FCC Rcd 1255 (1990) proposing to allocate the 1530-1544 MHz and 1626.5-1645.5 MHz bands for a generic MSS; *see also Report and Order*, GEN Docket Nos. 84-1231, 84-1233, and 84-1234, 2 FCC Rcd 1825 (1986), *recon. denied*, 2 FCC Rcd 6830 (1987), *further recon. denied*, GEN Docket No. 84-1234, 4 FCC Rcd 6016 (1989) allocating the 1545-1559 MHz and 1646.5-1660.5 MHz bands for a generic MSS. In these proceedings the Commission adopted generic allocations, rather than separate allocations for various types of mobile-satellite services (*e.g.*, aeronautical MSS, land MSS, maritime MSS) as is done internationally.

[5] *See Final Acts*, Part A.

[6] *See* 47 C.F.R. § 2.106. The 29.95-30.00 GHz band is also allocated to the Earth Exploration-Satellite Service on a secondary basis.

[7] *See Notice of Proposed Rule Making* (*Notice*), ET Docket No. 92-191, 7 FCC Rcd 5626 (1992).

[8] The Commission did not propose allocating 20/30 GHz for broadcasting, noting that the international Table of Frequency Allocations does not include a broadcasting-satellite service in these bands and that the general satellite proposal had not been adopted at WARC-92.

market demands in their use of these bands. The Commission also agreed with NASA that use of digital transmission and advanced technologies, such as "electronically hopping" spot-beam antennas and on-board switches, will reduce technical differences between MSS and FSS; and that the removal of requirements to operate multiple services in separate frequency bands would simplify satellite communications system-design and improve spectrum and orbital efficiency.

7. Comments supporting our proposal to upgrade the 20/30 GHz MSS allocation from secondary to primary were filed by Calling, Endgate, and Norris. Calling and Endgate agree with our tentative assessment in the *Notice* that technology, rather than restrictive service definitions, should determine access to the 20/30 GHz bands in order to encourage the development of this unused spectrum.[9] They further concur that upgrading the allocation will provide service providers more flexibility and permit a wider variety of services. Norris states that aggregating services on the same satellite would promote spectrum efficiency, reduce transaction costs, and achieve economies of scale and scope.[10]

8. While TRW does not object to the proposals set forth in the *Notice*, it requested clarification that the proposed MSS upgrade would not remove FSS uses currently permitted under Section 25.202(a)(2) of the Rules.[11] In particular, TRW expresses concern with the domestic application of international footnote 873E. This issue is discussed in the WARC-92 Implementation section, *infra*.

9. We continue to believe that upgrading the MSS allocation at 20/30 GHz to primary status will promote more efficient use of this spectrum. We agree with the commenting parties that a multiple service allocation would expand opportunities for satellite services and enable satellite operators to better satisfy consumer requirements. In view of the fact that the 20/30 GHz bands currently are not utilized for FSS and only represent 20 percent of the frequencies available to FSS between 17 GHz and 30 GHz, we conclude that a primary allocation for MSS in the 20/30 GHz bands will have no significant adverse impact on FSS. Accordingly, we are upgrading the MSS allocation at 20/30 GHz to primary status. The MSS primary allocation will be shared with the existing primary FSS allocation. This amendment to the domestic Allocations Table is consistent with the WARC-92 decisions.[12]

WARC-92 Implementation

10. In addition to upgrading the secondary allocation of MSS at 20/30 GHz in Region 2, WARC-92 modified certain footnotes and adopted additional new footnotes to the international Allocations Table that apply to these bands.[13] These footnotes pertain to operations of the satellite services and to allocations specific to certain countries. In the *Notice*, we proposed updating the domestic Table of Frequency Allocations to reflect these changes.

11. In its comments, TRW expresses concern with the application of international footnote 873E as it applies to permissible FSS uses.[14] Footnote 873E limits MSS services in the 20/30 GHz band to networks that also provide FSS in this band.[15] TRW requests that we clarify that the implementation of the provisions of the international allocation would not affect its proposed use of a portion of this band for FSS feeder links supporting a low-Earth orbit (LEO) system for which it has an application pending.[16] In particular, TRW questions whether the proposed co-primary MSS and FSS allocation would require a system to provide both MSS and FSS in this band, and if so, whether that requirement would prevent it from using 20/30 GHz frequencies for the feeder links of its Odyssey LEO MSS system.[17]

12. TRW also expresses concern about the implementation of International Radio Regulation 2613 (RR 2613), which provides interference protection to FSS geostationary operations from non-geostationary operations.[18] TRW argues that RR 2613 should0 apply only to operations that use exclusive FSS allocations, and not to operations that may use the co-primary MSS and FSS allocation proposed for 20/30 GHz. To address this concern, TRW proposes the following U.S. footnote: "RR 2613 shall not be applied to require non-geostationary systems of the Mobile-Satellite Service to cease or reduce feeder link operations in the 19.7-20.2 GHz and 29.5-30.0 GHz bands."

13. With regard to TRW's concern with permissible uses of the 20/30 GHz band, WARC-92 maintained the allocation for FSS in this band when it upgraded MSS to primary. We also are retaining the domestic FSS primary allocation, and therefore upgrading MSS to primary will not affect permissible uses of the FSS. We note that the definition of FSS includes feeder links for the space telecommunication services.

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[9] *See* Calling Reply at 1 (December 2, 1992); Endgate Reply at 1 (December 2, 1992).

[10] *See* Norris at 3 (November 2, 1992).

[11] *See* TRW at 2 (November 2, 1992). Section 25.202(a)(2) states that Fixed-Satellite service frequencies may be used for links between radiodetermination satellites and control centers.

[12] We are making no change to the secondary allocation for the Earth Exploration-Satellite Service at 29.95-30.00 GHz.

[13] In the 19.7-20.2 GHz band, footnote 873 was modified and footnotes 873A, 873B, 873C, 873D, and 873E were added. In the 29.5-30.0 GHz band, footnote 883 was modified and footnotes 882A, 882B, 882C, and 882D were added. *See Final Acts, supra*.

[14] TRW at 4.

[15] Footnote 873E states: The use of the bands 19.7-20.1 GHz and 29.5-29.9 GHz by the mobile-satellite service in Region 2 is limited to satellite networks which are both in the fixed-satellite service and in the mobile-satellite service as described in No. 873B.

[16] *See* TRW applications for authority to construct a LEO-MSS system in the 1610-1626.5 MHz and 2483.5-2500 MHz bands, file nos. 20-DSS-P-91(12) and CSS-91-015.

[17] Feeder links are considered to be a FSS operation. TRW's Odyssey MSS operations would occur in the 1610-1626.5 and 2483.5-2500 MHz bands.

[18] RR 2613 states: "Non-geostationary space stations shall cease or reduce to negligible level their emissions, and their associated earth stations shall not transmit to them, whenever there is insufficient angular separation between non-geostationary satellites and geostationary satellites, and whenever there is unacceptable interference (the level of accepted interference shall be fixed by agreement between the administrations concerned, using the relevant CCIR Recommendations as a guide) to geostationary-satellite space systems in the fixed-satellite service operating in accordance with these Regulations."

14. With regard to TRW's proposal to exempt non-geostationary systems using the 20/30 GHz band from applications of RR 2613, we note that the MSS Above 1 GHz Negotiated Rule Making Committee (Rule Making Committee) examined feeder link requirements of low-Earth orbiting (LEO) systems and addressed how these feeder links could share this band.[19] The Rule Making Committee addressed the application of RR 2613 to non-geostationary systems that plan to use feeder links in the 20/30 GHz band and recommended that the U.S. seek international agreement that RR 2613 would not be invoked to terminate operations of non-geostationary systems unless certain conditions are met.[20] The Rule Making Committee also recommended that the Commission require that affected operators coordinate use of the shared bands. We intend to discuss these issues in more detail and determine the domestic implementation of the international regulations in the proceeding that addresses service rules for "big" LEO satellites.[21]

15. With the exception of TRW's concern regarding footnote 873E, no party objected to the proposed changes to the international Table of Frequency Allocations. Accordingly, we are updating the Table of Frequency Allocations to conform with the *Final Acts* of WARC-92. The texts of these footnotes are set forth in the Appendix.[22]

Technical Issues

16. In the *Notice,* we requested comment on any technical standards that we should consider. In particular, we requested comment on NASA's suggestion to partition the 20/30 GHz bands into sub-bands, each with its own set of standards, to accommodate systems with different antenna gains and modulation techniques.

17. Calling, Endgate, and Norris argue that it is premature to consider adopting technical rules. According to Norris, partitioning the 20/30 GHz band as suggested by NASA might not be needed to permit provision of envisioned services. Further, Norris notes that NASA's Advanced Communications Technology Satellite (ACTS) experiments are intended to demonstrate the technical feasibility of various satellite operations at 20/30 GHz.[23] It urges the Commission to defer consideration of technical rules and standards until results from the ACTS experiments are available.

18. We agree that it would be premature to partition the 20/30 GHz band at this time. We expect that the experimental results obtained from the ACTS experiments will provide significant new technical and operational information directly related to future use of this band. Therefore, we decline to consider technical rules and standards at this time.

CONCLUSION

19. By this action, we are upgrading to primary the existing secondary MSS allocation at 19.7-20.2 and 29.5-30 GHz and implementing changes in related footnotes to the international Table of Allocations that were adopted by WARC-92. This allocation will provide increased opportunities for mobile satellite communications and increase spectrum efficiency. This action is consistent with Commission goals of providing for service to the public utilizing this band and promoting development of innovative satellite technologies and related industries.

ORDERING CLAUSES

20. Accordingly, IT IS ORDERED That Part 2 of the Commission's Rules, 47 C.F.R. Part 2, IS AMENDED as set forth in the attached Appendix, effective 30 days after publication in the Federal Register. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED. Authority for this Rule Making is contained in Sections 4(i), 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(c), 303(f), 303(g), and 303(r).

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[19] *See Report of the MSS Above 1 GHz Negotiated Rule Making Committee,* dated April 6, 1993. The Rule Making Committee, chartered by the Commission in January 1993 pursuant to the Negotiated Rule Making Act of 1990 (NRA) (Pub. L. 101-648), was convened to provide expert advice and recommendations to the FCC on technical matters related to the establishment and regulation of a MSS in the 1610-1626.5 and 2483.5-2500 MHz bands. The Rule Making Committee's goal was to reach consensus on recommended technical rules. In accordance with the NRA, the Rule Making Committee's recommendations served as the basis for proposals the Commission made to govern use of these bands by LEO satellites. *See Public Notice* in CC Docket No. 92-166, dated December 15, 1992.

[20] The three conditions are: 1) the administrations of the systems involved must engage in bilateral or multilateral discussions and reach agreement as to a level of "accepted interference," 2) after the systems are in operation, the non-geostationary system must exceed the accepted interference level and, 3) the interference in excess of the agreed level must be caused by the failure of the non-geostationary system to maintain sufficient angular separation between the satellites of the two systems.

[21] *See* Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile-Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands, *Notice of Proposed Rule Making,* in CC Docket No. 92-166, 9 FCC Rcd 1094 (1994).

[22] We note that the 29.5-30.0 GHz band lies immediately adjacent to the 27.5-29.5 GHz band, which is currently the subject of a negotiated rule making proceeding regarding the proposed Local Multipoint Distribution Service. *See, Notice of Proposed Rule Making in the Matter of Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service (LMDS Rule Making),* CC Docket 92-297, 8 Fcc Rcd 557 (1993); *Second Notice of Proposed Rule Making in LMDS Rule Making,* CC Docket 92-297, 9 FCC Rcd 1394 (1994). We do not expect difficulty for the two services to avoid harmful interference.

[23] NASA launched ACTS in September 1993. ACTS provides a research vehicle for satellite communications using the 20/30 GHz band. This satellite enables the satellite communications industry to test key technologies and develop new commercial services. These technologies include 20/30 GHz hardware, "electronically hopping" spot-beam antennas, and two types of on-board signal switches: a baseband processor switch and an intermediate frequency (IF) switch matrix. New services that might be developed include supercomputer access, satellite-based cellular networks, narrowband mobile systems, and a variety of video services. Experimental testing began December 6, 1993, and 17 different experiments had been started by February 1994.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

Final Regulatory Flexibility Analysis

21. The Commission certifies that the Regulatory Flexibility Act of 1980 does not apply to this rule making proceeding because there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. The Secretary shall send a copy of the *Report and Order,* including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Public Law No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq* (1981).

RULE CHANGES

Part 2 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 2 - FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

1. The authority citation in Part 2 continues to read:

AUTHORITY: Sections 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 302, 303, and 307, unless otherwise noted.

2. Section 2.106, the Table of Frequency Allocations is amended as follows: "

a. In columns 1, 2, 3, and 5; the band 19.7-20.2 GHz is removed and the bands 19.7-20.1 GHz and 20.1-20.2 GHz are added, and related footnotes added according to the following table.

b. In columns 1, 2, 3, and 5; the band 29.5-30 GHz is removed and the bands 29.5-29.9 GHz and 29.9-30 GHz are added, and related footnotes added according to the following table.

c. Upon amending the Table of Frequency Allocations, the affected sections will read as follows: Section 2.106 Table of Frequency Allocations

Section 2.106 Table of Frequency Allocations

* * * * *

International table			United States table		FCC use designators	
Region 1 - allocation GHz	Region 2 - allocation GHz	Region 3 - allocation GHz	Government Allocation GHz	Non-Government Allocation GHz	Rule part(s)	Special-use frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
*	*	*	*	*		*
19.7-20.1 FIXED-SATELLITE (space-to-Earth). Mobile-Satellite (space-to-Earth). 873	19.7-20.1 FIXED-SATELLITE (space-to-Earth). MOBILE-SATELLITE (space-to-Earth). 873 873A 873B 873C 873D 873E	19.7-20.1 FIXED-SATELLITE (space-to-Earth). Mobile-Satellite (space-to-Earth). 873	19.7-20.2	19.7-20.1 FIXED-SATELLITE (space-to-Earth). MOBILE-SATELLITE (space-to-Earth). 873A 873B 873C 873D 873E		
20.1-20.2 FIXED-SATELLITE (space-to-Earth). MOBILE-SATELLITE (space-to-Earth). 873 873A 873B 873C 873D				20.1-20.2 FIXED-SATELLITE (space-to-Earth). MOBILE-SATELLITE (space-to-Earth). 873A 873B 873C 873D		

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International table			United States table		FCC use designators	
			Government	Non-Government		
Region 1 - allocation GHz	Region 2 - allocation GHz	Region 3 - allocation GHz	Allocation GHz	Allocation GHz	Rule part(s)	Special-use frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
*	*	*	*	*	*	*
29.5-29.9 FIXED-SATELLITE (Earth-to-space) 882D Mobile-Satellite (Earth-to-space). Earth Exploration-Satellite (Earth-to-space) 882C 882B 883	29.5-29.9 FIXED-SATELLITE (Earth-to-space) 882D MOBILE-SATELLITE (Earth-to-space). Earth Exploration-Satellite (Earth-to-space) 882C 873A 873B 873C 873E 882B 883	29.5-29.9 FIXED-SATELLITE (Earth-to-space) 882D Mobile-Satellite (Earth-to-space). Earth Exploration-Satellite (Earth-to-space) 882C 882B 883	29.5-30.0	29.5-29.9 FIXED-SATELLITE (Earth-to-space). MOBILE-SATELLITE (Earth-to-space). 873A 873B 873C 873E		
29.9-30 FIXED-SATELLITE (Earth-to-space) 882D MOBILE-SATELLITE (Earth-to-space). Earth Exploration-Satellite (Earth-to-space) 882C 873A 873B 873C 882 882A 882B 883				29.9-30.0 FIXED-SATELLITE (Earth-to-space). MOBILE-SATELLITE (Earth-to-space). 873A 873B 873C 882		
*	*	*	*	*	*	*

d. INTERNATIONAL FOOTNOTES Nos. 873 and 883 are revised, and Nos. 873A, 873B, 873C, 873D, 873E, 882A, 882B, 882C, and 882D are added:

* * * * *

873 Additional allocation: in Afghanistan, Algeria, Angola, Saudi Arabia, Bahrain, Bangladesh, Brazil, Brunei Darussalam, Cameroon, China, the Congo, the Republic of Korea, Costa Rica, Egypt, the United Arab Emirates, Gabon, Guatemala, Guinea, India, Indonesia, Iran, Iraq, Israel, Japan, Jordan, Kenya, Kuwait, Lebanon, Malaysia, Mali, Morocco, Mauritania, Nepal, Niger, Nigeria, Oman, Pakistan, the Philippines, Qatar, Syria, Singapore, Somalia, Sudan, Sri Lanka, Tanzania, Chad, Thailand, Togo, Tunisia, and Zaire, the band 19.7-21.2 GHz is also allocated to the fixed and mobile services on a primary basis. This additional use shall not impose any limitation on the power flux-density of space stations in the fixed-satellite service in the band 19.7-21.2 GHz and of space stations in the mobile-satellite service in the band 19.7-20.2 GHz where such allocation to the mobile-satellite service is on a primary basis in the latter band.

873A In order to facilitate interregional coordination between networks in the mobile-satellite and fixed-satellite services, carriers in the mobile-satellite service that are most susceptible to interference shall, to the extent practicable, be located in the higher parts of the bands 19.7-20.2 GHz and 29.5-30 GHz.

873B In the bands 19.7-20.2 GHz and 29.5-30 GHz in Region 2, and in the bands 20.1-20.2 GHz and 29.9-30 GHz in Regions 1 and 3, networks which are both in the fixed-satellite service and in the mobile-satellite service may include links between earth stations at specified or unspecified points or while in motion, through one or more satellites for point-to-point and point-to-multipoint communications.

873C In the bands 19.7-20.2 GHz and 29.5-30 GHz, the provisions of No. 953 do not apply with respect to the mobile-satellite service.

873D The allocation to the mobile-satellite service is intended for use by networks which use narrow spot-beam antennas and other advanced technology at the space stations. Administrations operating systems in the mobile-satellite service in the band 19.7-20.1 GHz in Region 2 and in the band 20.1-20.2 GHz shall take all practicable steps to ensure the continued availability of these bands for administrations operating fixed and mobile systems in accordance with the provisions of No. 873.

873E The use of the bands 19.7-20.1 GHz and 29.5-29.9 GHz by the mobile-satellite service in Region 2 is limited to satellite networks which are both in the fixed-satellite service and in the mobile-satellite service as described in No. 873B.

* * * * *

882A Additional allocation: the bands 27.500-27.501 GHz and 29.999-30.000 GHz are also allocated to the fixed-satellite service (space-to-Earth) on a primary basis for the beacon transmissions intended for up link power control.

Such space-to-Earth transmissions shall not exceed an equivalent isotropically radiated power (e.i.r.p.) of +10 dBW in the direction of adjacent satellites on the geostationary-satellite orbit. In the band 27.500-27.501 GHz, such space-to-Earth transmissions shall not produce a power flux-density in excess of the values specified in No. 2578 on the Earth's surface.

882B Additional allocation: the band 27.501-29.999 GHz is also allocated to the fixed-satellite service (space-to-Earth) on a secondary basis for beacon transmissions intended for up link power control.

882C In the band 28.5-30 GHz, the earth exploration-satellite service is limited to the transfer of data between stations and not to the primary collection of information by means of active or passive sensors.

882D The band 27.5-30 GHz may be used by the fixed-satellite service (Earth-to-space) for the provision of feeder links for the broadcasting-satellite service.

883 Additional allocation: in Afghanistan, Algeria, Saudi Arabia, Bahrain, Bangladesh, Brunei Darussalam, Cameroon, China, the Congo, the Republic of Korea, Egypt, the United Arab Emirates, Ethiopia, Guinea, India, Indonesia, Iran, Iraq, Israel, Japan, Jordan, Kenya, Kuwait, Lebanon, Malaysia, Mali, Morocco, Mauritania, Nepal, Niger, Pakistan, Qatar, Syria, Singapore, Somalia, Sudan, Sri Lanka, Chad, and Thailand, the band 29.5-31 GHz is also allocated to the fixed and mobile services on a secondary basis. The power limits specified in Nos. 2505 and 2508 shall apply.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-82

In the Matter of

Amendment of Section 73.202(b), RM-8487
Table of Allotments,
FM Broadcast Stations.
(Spencer and Sac City, Iowa,
St. James, Minnesota)

NOTICE OF PROPOSED RULE MAKING
AND
ORDER TO SHOW CAUSE

Adopted: July 12, 1994; Released: July 20, 1994

Comment Date: September 12, 1994
Reply Comment Date: September 27, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Iowa Great Lakes Broadcasting Company, Inc. ("petitioner"), requesting the substitution of Channel 285C2 for Channel 285A at Spencer, Iowa, and the modification of Station KIGL(FM)'s license to specify operation on the higher class channel. To accommodate the allotment of Channel 285C2 at Spencer, petitioner also requests the substitution of Channel 268A for Channel 285A at St. James, Minnesota, and the modification of Station KXAX's license accordingly. Petitioner also requests the deletion of unoccupied and unapplied for Channel 284A at Sac City, Iowa.

2. In support of its request, petitioner states that the allotment of Channel 285C2 to Spencer will enable Station KIGL(FM) to expand its 60 dBu coverage area from its present 1,691 square kilometers to 8,560 square kilometers, which represents a five-fold increase in coverage. As to the substitution of channels at St. James, petitioner states that Station KXAX presently operates with an effective radiated power of 3 kilowatts and a height above average terrain of 85 meters. However, if Station KXAX's license is modified to Channel 268A, petitioner states that the station can increase power to 6 kW, thus expanding the area and population which the station will serve. Finally, petitioner requests that Channel 284A be deleted from Sac City. It states that Sac City was originally allotted Channel 286A in 1985 pursuant to the Commission's action in MM Docket 84-231[1] and that this channel was later replaced with Channel 284A to accommodate other changes in the Table of Allotments.[2] Since no application for Channel 284A has ever been filed, petitioner argues that there is clearly no interest in its use.

Technical Summary

3. We believe petitioner's proposal warrants consideration because the proposed substitution would provide Spencer with an additional wide coverage area service and enable Station KIGL(FM) to expand its service area. Channel 285C2 can be allotted to Spencer in compliance with the Commission's minimum distance separation requirements with a site restriction of 11.2 kilometers (6.9 miles) northwest to accommodate petitioner's desired transmitter site and avoid short-spacings to Stations KLMJ, Channel 285A, Hampton, Iowa, KKLS-FM, Channel 284C1, Sioux Falls, South Dakota, KARL, Channel 286C2, Tracy, Minnesota, and KIWA-FM, Channel 287C2, Sheldon, Iowa. Channel 268A can be allotted to St. James, Minnesota, in compliance with the Commission's minimum distance separation requirements at the presently licensed transmitter site of Station KXAX.[3] We shall also propose to modify the license for Station KIGL(FM) to specify operation on Channel 285C2 in lieu of its present Channel 285A. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 285C2 at Spencer or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties. We also propose to delete Channel 284A from Sac City, Iowa, without replacement. Channel 284A was allotted to Sac City pursuant to the *Report and Order* in MM Docket 92-155, 8 FCC Rcd 4086. Although the filing window for applications opened on September 21, 1992, no party has submitted an application for its use. Therefore, unless a party files initial comments herein stating an intention to apply for channel 284A at Sac City, we will delete the allotment.

4. Whenever an existing licensee is ordered to switch frequencies to accommodate a new channel allotment, we require the proponent of the new allotment to make a commitment that it will reimburse the affected station for the costs incurred in changing frequencies. Petitioner has acknowledged its responsibility to reimburse Station KXAX, St. James, Minnesota,for the reasonable costs in changing frequency.

5. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Sac City, Iowa	284A	--
Spencer, Iowa	285A, 299C1	285C2, 299C1
St. James, Minnesota	263C2, 285A	263C2, 268A

[1] *See* 50 FR 3514, January 25, 1994.
[2] *See* 8 FCC Rcd 4086 (1993).
[3] The coordinates for Channel 285C2 at Spencer are 43-14-32 North Latitude and 95-09-19 West Longitude. .The coordinates for Channel 268A at St. James are 44-03-15 North Latitude and 94-39-40 West Longitude.

6. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Rogers Broadcasting, Inc., licensee of Station KXAX, St. James, Minnesota, SHALL SHOW CAUSE why its license SHOULD NOT BE MODIFIED to specify operation on Channel 268A as proposed herein instead of the present Channel 285A.

7. Pursuant to Section 1.87 of the Commission's Rules, Rogers Broadcasting, Inc., may, not later than **September 12, 1994**, file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Rogers Broadcasting, Inc. to furnish additional information. If Rogers Broadcasting, Inc., raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Rogers Broadcasting, Inc., will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

8. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making and Order to Show Cause* to the licensee of Station KXAX, as follows: Rogers Broadcasting, Inc., P.O. Box 465, St. James, Minnesota 56081.

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

10. Interested parties may file comments on or before **September 12, 1994**, and reply comments on or before **September 27, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Leonard S. Joyce, Esq.
5335 Wisconsin Avenue
Suite 300
Washington, D.C. 20015
(Counsel to petitioner)

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

12. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as

they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-74

In the Matter of

Amendment of Section 73.202(b) RM-8503
Table of Allotments,
FM Broadcast Stations.
(Elma, Washington)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 21, 1994; Released: July 20, 1994

Comment Date: September 12, 1994
Reply Comment Date: September 27, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Skip Marrow ("petitioner"), proposing the allotment of Channel 271A at Elma, Washington, as that community's first local aural transmission service. Petitioner states that he will apply for the channel, if allotted.

2. In support of the proposal, petitioner states that Elma is located in Grays Harbor County and has a 1990 U.S. Census population of 3,011 persons.

3. We believe the public interest would be served by proposing the allotment of Channel 271A at Elma, Washington, since it could provide the community with its first local aural transmission service. An engineering analysis has determined that Channel 271A can be allotted to Elma in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction at the petitioner's requested site.[1] Since Elma is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been requested.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Elma, Washington	–	271A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **September 12, 1994**, and reply comments on or before **September 27, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Nancy A. Ory
Leventhal, Senter & Lerman
2000 K Street, N.W., Suite 600
Washington, D.C. 20006-1809
(Counsel for Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 271A at Elma are North Latitude 47-00-13 and West Longitude 123-24-27.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 1.49
of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: July 7, 1994; Released: July 20, 1994

By the Commission:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order,* we grant petitions for reconsideration of our prior *Order* in this proceeding, which amended Section 1.49(a) of the Rules, 47 C.F.R. § 1.49(a), to require that Commission filings must utilize 10- or 12-point type print, which we defined as "print consist[ing] of 10 and 12 characters per inch." *Amendment of Section 1.49 of the Commission's Rules,* 8 FCC Rcd 7092 ¶ 2 (1993). The Commission reasoned that this change would ensure that the Commission's page limits, set forth elsewhere in the rules, would not be circumvented by printing reduction processes. On reconsideration, to achieve the same goal more effectively, we now eliminate the character per inch requirement, but amend section 1.49(a) to require that all Commission filings utilize type of at least 12-point in height, be double spaced, and be filed on A4 (21 cm. x 29.7 cm.) or 8½ x 11 inch (21.6 cm. x 27.9 cm.) paper with the printed material not exceeding 6½ x 9½ inches (16.5 cm. x 24.1 cm.). We also make conforming amendments to section 1.50 of the Rules.[1]

II. BACKGROUND

2. Pending before the Commission are: (a) a petition for reconsideration and/or clarification, filed October 29, 1993, by the law firm of Bechtel & Cole, Chartered; (b) a petition for reconsideration, filed December 30 1993, by David B. Popkin; and (c) a petition for reconsideration, filed November 15, 1993, by Lawrence Behr Associates, Inc. The petitions for reconsideration are unopposed.

3. Petitioners explain that our earlier action was based on a mistake of fact. They note that "point" refers to the height rather than to the width or "pitch" of the characters (i.e., the number of characters per linear inch), and that the number of characters per linear inch varies depending not just on the point size but also on the particular typeface selected.

4. To demonstrate that both the typeface and the point affect the volume of the text that fits on a page, Bechtel & Cole submits five different versions of its pleading -- three in 10-point and two in 12-point type. By way of comparison, the pleadings printed in 10-point type contain 33% to 50% more text than the version using 12-point Courier type. Based upon its observation that most pleadings filed with the Commission and the courts in the last twenty years have utilized 12-point Courier type or its equivalent, Bechtel & Cole recommends that the Commission require 12-point Courier type. As an alternative, it suggests that the Commission consider the approach recently adopted by the United States Court of Appeals for the District of Columbia Circuit of specifying a maximum word count for printed briefs and for briefs prepared by a word processor capable of counting words. In support of this approach Bechtel & Cole asserts that most parties have access to a word processor capable of automatically counting the number of words in a document.

III. DISCUSSION

5. In accordance with our original concern that page limits not be controverted, we amend section 1.49(a) as follows. As an initial matter, we reject Popkins' suggestion that our earlier action was overly burdensome with respect to pleadings that are less than 10 pages in length. Page limits are intended to do more than merely prohibit lengthy filings that are burdensome to the Commission and may delay the ultimate resolution of a proceeding. They also seek to ensure that all parties filing a particular pleading have an equal opportunity to make a substantive presentation to the Commission. Whatever the page limit, the public interest is disserved to the extent that printing reduction processes enable parties to manipulate the page limits, thereby gaining an advantage over their opponents. By specifying with greater precision the acceptable format for Commission filings, we seek to minimize any burden to those without access to sophisticated word processing equipment and at the same time ensure that such equipment does not afford any party an unfair advantage over another.

6. With these objectives in mind, we turn to the general format requirements for Commission filings. First, we will continue to require that pleadings be double-spaced. However, we amend the rule to require a minimum distance of 7/32 of an inch (0.5556 cm.) between each line of text. Footnotes and quoted passages may be single spaced with a minimum distance of 1/16 of an inch (0.158 cm.) between the lines. We caution parties against abusing this rule by filing pleadings that contain excessive single-spaced material. Such pleadings may, at the Commission's discretion, either be rejected or dismissed with leave to be refiled in proper form.[2] Second, we continue to require that pleadings must be filed on either A4 (21 cm. x 29.7 cm.) or 8½ x 11 inch (21.6 cm. x 27.9 cm.) paper. However, we revise

[1] Our rule amendments also include metric measurements that were previously added, *see Metric Conversion of the Commission's Rules,* 8 FCC Rcd 3720 (1993), but were inadvertently deleted in our prior order in this proceeding.

[2] See, e.g., District of Columbia Circuit Rule 28(d)(2), which deals with briefs prepared by typewriters or word processing systems that do not count words. Parties filing such briefs are cautioned against evasion of the specified page limitations by employing extended single spaced passages or by excessive use of footnotes, and are further cautioned that such briefs may be rejected or dismissed with leave to be refiled in proper form. (As noted in paragraph 4 above, the court specifies maximum word limitations for briefs prepared by word processing systems or standard typographic printing.

the rule to require that the margins must be set so that the printed matter does not exceed 6½ x 9½ inches (16.5 cm. x 24.1 cm.).[3]

7. Third, we accept the suggestion of Bechtel & Cole that pleadings utilize 12-point or larger type. We note that a point is approximately 1/72 of an inch (.0352 cm.), that many pleadings filed with the Commission do, as Bechtel & Cole points out, utilize a type of at least 12-point in height, and that 12-point type is readily available on most typewriters and word processing systems. Under these circumstances, requiring 12-point (i.e., 12/72 of an inch or 0.42333 cm.) or larger type will not, in our view, impose a hardship on those wishing to file pleadings and documents for Commission consideration.

8. Having specified the point size, the margins, and vertical spacing requirements or "leading" for Commission pleadings, we deem it unnecessary to specify the "pitch" or spacing between letters or to specify a particular typeface for Commission filings. We are concerned that specifications as to the pitch or number of characters per inch would effectively preclude the use of non-proportional type, despite its widespread use by those with access to sophisticated word-processing systems. By the same token, we are reluctant to prescribe the maximum number of words per pleading, such as the approach recently adopted by the D.C. Court of Appeals for the District of Columbia Circuit. Although this would avoid the problem of filings that employ extended single-spaced passages or excessive footnotes to evade specified page limitations, we fear that this would disadvantage those parties without access to sophisticated word processing equipment capable of automatically counting words. Parties are cautioned, however, that they are required to file legible pleadings and that their causes will rarely be served by filings that so cram the letters together as to make consideration of their pleading difficult for the Commission.

9. On our own motion we are also revising 47 C.F.R. § 1.50, which sets forth the specifications for briefs, to reflect that our preference is for typewritten or mechanically processed briefs rather than printed briefs. We will continue to require that typewritten or mechanically prepared briefs must conform to the general format requirements set forth in section 1.49 of the rules. In other words, they must be filed on A4 (21 cm. x 29.7 cm.) or 8½ x 11 inch paper (21.6 cm. x 27.9 cm.) with the printed material not exceeding 6½ x 9½ inches (16.5 cm. x 24.1 cm.), they must be double spaced with at least 7/32 of an inch (0.5556 cm.) between each line of text, and they must be printed in a typeface that is 12-point or larger in height. With regard to printed briefs, however, our experience has been that, with the widespread use of word processing equipment and improved duplicating techniques, few parties file printed briefs. Henceforth printed briefs will be accepted only if specifically requested by the Commission.

10. ACCORDINGLY, IT IS ORDERED That the petition for reconsideration and/or clarification, filed October 29, 1993 by the law firm of Bechtel & Cole, Chartered; and the petitions for reconsideration filed on November 15, 1993 by Lawrence Behr Associates, Inc., and on December 30, 1993 by David B. Popkin ARE GRANTED to the extent reflected above and ARE DENIED in all other respects.

11. IT IS FURTHER ORDERED That, pursuant to sections 4(i), 4(j) and 303(r) of the Communications Act of 1934, as amended, sections 1.49(a) and 1.50, 47 C.F.R. §§ 1.49(a) and 1.50, Part 1 of the Commission's Rules ARE AMENDED as set forth below, effective upon publication in the Federal Register. This proceeding involves agency practice and procedure, and thus the notice and comment and effective date provisions of section 553 of the Administrative Procedure Act, 5 U.S.C. §§ 553(b)(A), (d), are inapplicable.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

Part 1 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 1 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303; Implement, 5 U.S.C. § 552 and 21 U.S.C. § 853a, unless otherwise noted.

2. Section 1.49 is amended by revising paragraph (a) to read as follows:

§1.49 Specifications as to pleadings and documents.

(a) All pleadings and documents filed in any Commission proceeding shall be typewritten or prepared by mechanical processing methods, and shall be filed on A4 (21 cm. x 29.7 cm.) or on 8½ x 11 inch (21.6 cm. x 27.9 cm.) paper with the margins set so that the printed material does not exceed 6½ x 9½ inches (16.5 cm. x 24.1 cm.). The printed material may be in any typeface of at least 12-point (0.42333 cm. or 12/72") in height. The body of the text must be double spaced with a minimum distance of 7/32 of an inch (0.5556 cm.) between each line of text. Footnotes and long, indented quotations may be single spaced, but must be in type that is 12-point or larger in height, with at least 1/16 of an inch (0.158 cm.) between each line of text. Counsel are cautioned against employing extended single spaced passages or excessive footnotes to evade prescribed pleading lengths. If single-spaced passages or footnotes are used in this manner the pleading will, at the discretion of the Commission, either be rejected as unacceptable for

[3] See, e.g., Federal Rules of Appellate Procedure Rule 32(a), which provides that all briefs except those produced by standard typographic process are to be filed on paper not exceeding 8½ x 11 inches and typed matter not exceeding 6½ x 9½ inches, with double spacing between each line of text.

filing or dismissed with leave to be refiled in proper form. Pleadings may be printed on both sides of the paper. Pleadings that use only one side of the paper shall be stapled, or otherwise bound, in the upper left-hand corner; those using both sides of the paper shall be stapled twice, or otherwise bound, along the left-hand margin so that it opens like a book. The foregoing shall not apply to printed briefs specifically requested by the Commission, official publications, charts and maps, original documents (or admissible copies thereof) offered as exhibits, specially prepared exhibits, or if otherwise specifically provided. All copies shall be clearly legible.

3. Section 1.50 is revised to read as follows:

§ 1.50 Specifications as to briefs.

The Commission's preference is for briefs that are typewritten or prepared by mechanical processing methods. Printed briefs will be accepted only if specifically requested by the Commission. Typewritten or mechanically produced briefs must conform to all of the specifications for pleadings and documents set forth in § 1.49.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: July 12, 1994

APPLICATION OF EX PARTE RULES TO PROCEEDING INVOLVING "FORMAL PETITION FOR ORDER TO SHOW CAUSE" AGAINST TAMPA BAY TELEVISION, INC., STATION WFTS(TV), TAMPA, FLORIDA

Pending before the Commission is a "Formal Petition for Order to Show Cause" filed by Southern Broadcast Corporation of Sarasota ("SBC") (the "Petition") against Tampa Bay Television, Inc. ("TBT"), a wholly owned subsidiary of Scripps Howard Broadcasting Company ("Scripps"). SBC has also filed an "Emergency Motion for Expedited Hearing" requesting expedited consideration of its Petition (the "Motion").

SBC requests the issuance of an order to show cause why TBT's license to operate Station WFTS (TV), Tampa, Florida, should not be revoked for willful violation of the Commission's network territorial exclusivity rule, 47 C.F.R. § 73.658(b). It also characterizes its Petition as a formal complaint. Alternatively, SBC requests a Commission inquiry into Scripps' network affiliation practices with respect to the ABC Television Network pursuant to Section 403 of the Communications Act, 47 U.S.C. § 403, and the issuance of a cease and desist order directing Scripps to cease its continued violation of the Commission's network territorial exclusivity rule.

To avoid any uncertainty, we are announcing that we are treating this matter as a restricted adjudicative proceeding under the Commission's *ex parte* rules. Accordingly, *ex parte* presentations made to or from decision-making personnel in connection with SBC's Petition and Motion, or any related matter, are prohibited until the Commission's final disposition of this proceeding is no longer subject to reconsideration or judicial review. *See* 47 C.F.R. § 1.1208(a).

This action is taken by Chief, Mass Media Bureau.

For further information, contact Catherine M. Withers, (202) 632-7048.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-162

In the Matter of

Local Exchange Carriers' Rates,
Terms, and Conditions for
Expanded Interconnection for
Special Access

Pacific Bell Transmittal No. 1719
Revisions to
Tariff F.C.C. No. 128

MEMORANDUM OPINION AND ORDER

Adopted: July 12, 1994; Released: July 15, 1994

By the Chief, Tariff Division:

1. On June 2, 1994, Pacific Bell filed Transmittal No. 1719 to revise its Tariff F.C.C. No. 128. Pacific Bell proposes including installation of repeaters in the cross-connection rates in two central offices where it has received orders for expanded interconnection service. Pacific Bell states that it has determined that repeaters are necessary to maintain service transmission quality and signal levels in these particular offices. Description and Justification at 1. No petitions were filed against this tariff. Transmittal 1719 is scheduled to take effect on July 17, 1994.

2. This transmittal raises the same issues regarding cost allocation, rate levels, rate structures, and terms and conditions of service as those identified in the *Expanded Interconnection Tariff Order*.[1] Therefore, Transmittal No. 1719 is suspended for one day, until July 18, 1994, and will be subject to the investigation initiated in the *Expanded Interconnection Tariff Order*. These rates will also be subject to an accounting order to facilitate any refunds that may later prove necessary.

3. Accordingly, IT IS ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the revisions to Pacific Bell Tariff F.C.C. No. 128, Transmittal No. 1719, ARE SUSPENDED for one day and an investigation of the referenced tariff transmittal IS INSTITUTED.

4. IT IS FURTHER ORDERED that Pacific Bell SHALL FILE tariff revisions within five business days of the release date of this Order to reflect this suspension.

5. IT IS FURTHER ORDERED that, for these purposes, we waive Sections 61.56, 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, and 61.59. Pacific Bell should cite the "DA" number of the instant Order as the authority for this filing.

6. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), Pacific Bell shall keep accurate account of all amounts received by reason of the rates that are the subject of this investigation.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] Ameritech Operating Companies, *et. al*, CC Docket No. 93-162, 8 FCC Rcd 4589 (Com. Car. Bur. 1993) (*Expanded Interconnection Tariff Order).*

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 92-209

In the Matter of

Amendment of Part 90 of the Commission's Rules to Expand Coordination of the 800 MHz General Category Channels — RM-7965

MEMORANDUM OPINION AND ORDER

Adopted: June 13, 1994; Released: July 11, 1994

By the Commission: Commissioners Ness and Chong not participating.

1. By this *Memorandum Opinion and Order,* we dismiss a petition for reconsideration[1] of our *Report and Order* (*R&O*)[2] in this proceeding filed by the National Association of Business and Educational Radio, Inc. (NABER). In the *R&O* we permitted Specialized Mobile Radio (SMR) applicants for conventional systems on General Category frequencies to use the services of any of three frequency coordinators[3] certified to recommend 800 MHz frequencies, rather than requiring them to use the services of NABER.

2. NABER now asserts the following, all of which we addressed in the *R&O:* first, that the three coordinators should follow "cross-coordination" procedures before submitting applications to the Commission;[4] second, that expanding coordination choices is "inconsistent" with an alleged finding that NABER, as a coordinator, is "the most representative of conventional SMR applicants";[5] and last, that this rule making should be expanded to include non-SMR applicants seeking coordination of General Category frequencies.[6] The Industrial Telecommunications Association, Inc., and the Council of Independent Communication Suppliers have filed a joint opposition to NABER's petition.[7]

3. Because NABER's petition relies on facts and assertions essentially identical to those already presented in this proceeding and raises issues already addressed in the *R&O,* there is no basis for granting the petition. *See, e.g., Memorandum Opinion and Order,* 7 FCC Rcd 1753, 1753 ¶ 3 (1992) (petitions dismissed because, *inter alia,* arguments were merely repeated). Accordingly, pursuant to Sections 4(i), 303(r), 332(a), and 405(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 332(a), and 405(a), and Section 1.429(i) of the Commission's Rules, 47 C.F.R. § 1.429(i), IT IS ORDERED that NABER's petition for reconsideration IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[1] Petition for Reconsideration, filed July 6, 1993 (Petition).
[2] 8 FCC Rcd 3626 (1993)(*R&O*), released May 24, 1993.
[3] The Associated Public-Safety Communications Officers, Inc. (APCO), the Industrial Telecommunications Association, Inc. (ITA), and the National Association of Business and Educational Radio, Inc. (NABER).
[4] Petition at 3-5; *see R&O* at 3628 ¶ 10.
[5] Petition at 5-6; *see R&O* at 3627 ¶ 8. *See generally Report and Order* in PR Docket No. 87-213, 5 FCC Rcd 4016, 4022-23 (1990); *Report and Order* in PR Docket No. 83-737, 103 FCC 2d 1093, 1119-23, 1144-45 (1986).
[6] Petition at 6-7; *see R&O* at 3627 n.27.
[7] Opposition to Petition for Reconsideration, filed September 9, 1993.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

John Calvin Kemmer, *Inter Vivos* Trust,
Larry M. Warner, Esquire, Trustee,
Applications to Construct and Operate
IVDS Systems in Nine Markets.

MEMORANDUM OPINION AND ORDER

Adopted: July 8, 1994; Released: July 20, 1994

By the Commission:

I. INTRODUCTION

1. This Memorandum Opinion and Order affirms the dismissal of a Petition for Reconsideration filed by Larry M. Warner, Esquire ("Warner"), trustee, on behalf of the John Calvin Kemmer, *Inter Vivos* Trust ("JCK Trust"). The JCK Trust is an applicant for Interactive Video and Data Service ("IVDS") licenses.

2. Eight of the JCK Trust's applications, although found unacceptable for filing, were conditionally included in an IVDS lottery held September 15, 1993.[1] After the JCK Trust's applications were not selected in any of the markets included in the lottery, the staff dismissed Warner's petition for reconsideration as moot. On November 17, 1993, Warner filed an Application for Review challenging the staff action.[2] For the reasons that follow, the staff action is affirmed.

II. BACKGROUND

3. Warner, on behalf of the JCK Trust, pursued two parallel avenues to have untimely applications accepted *nunc pro tunc* and included in the IVDS lottery held Setember 15, 1993. Between May 7, 1993, and May 12, 1993, he filed nine applications accompanied by individual petitions seeking acceptance of each application and nine waiver requests. By letter of July 1, 1993, the staff denied the waiver requests and dismissed the applications. On July 26, 1993, Warner filed a Petition for Reconsideration of the staff's action.

4. Concurrently, Warner sought the same relief in the IVDS rule making proceeding. On May 24, 1993, Warner filed a Petition for Reconsideration or Clarification in that proceeding seeking acceptance of the JCK Trust applications *nunc pro tunc*. In a *Memorandum Opinion and Order*, (MO&O), (adopted August 20, 1993, released September 3, 1993, published in the Federal Register September 16, 1993, and effective October 18, 1993), we denied Warner's petition.[3]

5. On July 23, 1993, a Public Notice was issued listing the applications that would be included in the lottery. The Public Notice conditionally included eight JCK Trust applications in the lottery pending final Commission action on the applications.[4] On September 15, 1993, as announced, the IVDS lottery was held. The numbers assigned to the JCK Trust applications were not selected.

III. DISCUSSION

6. Warner argues in his application for review that the JCK Trust applications were not included in the lottery of September 15, 1993. This assertion, however, is contrary to fact. Eight of the JCK Trust's applications were assigned lottery numbers and conditionally included in the lottery.

7. Warner's asserts that a final Commission action was taken on his applications after the July 23, 1993 Public Notice (conditionally including the applications pending final Commission action), and prior to the lottery. Specifically, Warner asserts that the MO&O adopted August 20, 1993 constituted a final Commission action on the JCK Trust applications. He asserts that that action became final on September 3, 1993, the day the MO&O was released.

8. Contrary to Warner's assertion, the MO&O became final the day after the lottery. Because it was part of a notice and comment rule making proceeding, the MO&O was not final until publication in the Federal Register. 47 C.F.R. §§ 1.4(b) and 1.103. The MO&O was published in summary form on September 16, 1993, the day following the lottery. 58 Fed. Reg. 48459 (1993).

9. Further, because the Petition for Reconsideration or Clarification concerned the rule making proceeding, the MO&O did not address the staff's denial of Warner's waiver requests or the dismissal of the nine applications of the JCK Trust. Warner's petition for reconsideration relating to that action was pending on the day of the lottery. After the JCK Trust's applications were not selected, the staff properly dismissed Warner's petition as moot.[5]

10. By the conditional inclusion of its applications in the lottery, the JCK Trust has received the relief that it sought, that is, a chance to be a winner in the lottery selection process. Each JCK Trust application filed for a market in which a lottery was held was fairly included in the lottery, albeit conditionally.

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[1] A number of applications, found unacceptable for filing by the Commission's staff, were conditionally included in the IVDS lottery (pending final Commission action) for markets 001-004, and 006-010. The JCK Trust applied for licenses in IVDS markets 001-009. No filing window was opened for market 005, Detroit, nor was a lottery for that market held due to its proximity to Canada. All applications for this market were dismissed.

[2] On December 7, 1993, Christina Del Valle and Luz Lobaton each filed an opposition to the application for review and a motion for acceptance of late filed pleading. Both parties are applicants for IVDS licenses. Their motions for acceptance of late filed pleadings are granted. We have considered both oppositions in resolving this matter, as well as the reply filed by Warner on December 17, 1993.

[3] 8 FCC Rcd 6409. The history regarding the allocation of spectrum and the rules establishing IVDS are set forth in that document, as are the reasons for denying the Petition for Reconsideration or Clarification.

[4] *See* Note 1, *supra*.

[5] Letter, Acting Chief, Special Services Branch, Licensing Division, Private Radio Bureau, October 19, 1993.

11. In view of the foregoing, and pursuant to the authority contained in Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), IT IS ORDERED THAT the dismissal by the staff on October 19, 1993, of the Petition for Reconsideration filed by Warner on July 26, 1993, IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COLONY	Chelmsford, MA 0147
CABLEVISION OF	Dartmouth, MA 0100
SOUTHEASTERN	Fall River, MA 0099
MASSACHUSETTS, INC.	Lowell, MA 0082
AND	New Bedford, MA 0067
LOWELL	Tewksbury, MA 0145
CABLE TELEVISION, INC.	
Petitioner	

v.

COMMONWEALTH OF MASSACHUSETTS
COMMUNITY ANTENNA TELEVISION
COMMISSION
Respondent

ORDER

Adopted: July 5, 1994; **Released: July 5, 1994**

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. In this Order, we grant the Motion for Extension of Time requested by the Massachusetts Community Antenna Television Commission ("Massachusetts Commission") in which to file its opposition to an appeal from the rate order of the Massachusetts Commission filed by Colony Cablevision of Southeastern Massachusetts, Inc. and Lowell Cable Television, Inc. ("Colony").

II. BACKGROUND

2. The Massachusetts Commission reports that as a local franchising authority under the Cable Act, it has recently issued 240 rate orders applicable to cable operators conducting business in Massachusetts.[6] Following release of the rate orders, several cable operators filed appeals with this Commission. Colony filed its appeal on June 22, 1994. The Massachusetts Commission requests an extension to August 1, 1994 of the due date for its opposition to the appeal by Colony.

III. DISCUSSION

3. The Massachusetts Commission requests the extension of time to file its opposition to the appeal of Colony to enable it to better perform its regulatory responsibilities. In its Motion, the Massachusetts Commission states that it has recently released 240 rate orders, that several of the affected cable operators have filed appeals of those orders, and that the Massachusetts Commission staff is also responsible for various additional regulatory concerns, including cost-of-service filings. Colony does not oppose the request for the extension of time.

4. It is the policy of the Commission that extensions of time shall not be granted routinely. The parties are reminded that they are expected to comply with deadlines set forth in the Commission's Rules and should not assume the grant of such motions in the future. However, there are no objections to this particular Motion.

5. We will grant the extension due to the considerable demands placed on the Massachusetts Commission as the local franchising authority for the entire Commonwealth of Massachusetts and due to the fact that the cable operator does not oppose the requested extension.

IV. ORDERING CLAUSE

6. Accordingly, IT IS ORDERED, that the Motion for Extension of Time of the Commonwealth of Massachusetts Community Antenna Television Commission to file its opposition to the Appeal of Colony Cablevision of Southeastern Massachusetts, Inc. and Lowell Cable Television, Inc. IS GRANTED. The due date for the opposition is now **August 1, 1994.** This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. §0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith Jones
Chief, Cable Services Bureau

[6] The local franchising authority is charged with regulating the basic tier and equipment rates of cable operators with its franchise area pursuant to the Cable Television Consumer Protection and Competition Act, Pub.L. No. 102-385, 106 Stat. 1460 (1992), §§543 and 544; Communications Act, §§623 and 624.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HARRON	Abington, MA 0225
COMMUNICATIONS	Bourne, MA 0247
CORP.	Halifax, MA 0229
Petitioner	Pembroke, MA 0228
	Plympton, MA 0245
	Rockland, MA 0224
	Sandwich, MA 0246

v.

COMMONWEALTH OF MASSACHUSETTS
COMMUNITY ANTENNA TELEVISION
COMMISSION
Respondent

ORDER

Adopted: July 5, 1994; Released: July 5, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. In this Order, we grant the Motion for Extension of Time requested by the Massachusetts Community Antenna Television Commission ("Massachusetts Commission") in which to file its opposition to a stay request and appeal from the rate order of the Massachusetts Commission filed by Harron Communications Corporation ("Harron").

II. BACKGROUND

2. The Massachusetts Commission reports that as a local franchising authority under the Cable Act, it has recently issued 240 rate orders applicable to cable operators conducting business in Massachusetts.[1] Following release of the rate orders, several cable operators filed appeals with this Commission. Harron filed its stay request and appeal on June 20, 1994. The Massachusetts Commission requests an extension to August 1, 1994 of the due date for its opposition to the appeal by Harron.

III. DISCUSSION

3. The Massachusetts Commission requests the extension of time to file its opposition to the stay request and appeal of Harron to enable it to better perform its regulatory responsibilities. In its Motion, the Massachusetts Commission states that it has recently released 240 rate orders, that several of the affected cable operators have filed appeals of those orders, and that the Massachusetts Commission staff is also responsible for various additional regulatory concerns, including cost-of-service filings. Harron does not oppose the request for the extension of time.

4. It is the policy of the Commission that extensions of time shall not be granted routinely. The parties are reminded that they are expected to comply with deadlines set forth in the Commission's Rules and should not assume the grant of such motions in the future. However, there are no objections to this particular Motion.

5. We will grant the extension due to the considerable demands placed on the Massachusetts Commission as the local franchising authority for the entire Commonwealth of Massachusetts and due to the fact that the cable operator does not oppose the requested extension.

IV. ORDERING CLAUSE

6. Accordingly, IT IS ORDERED, that the Motion for Extension of Time of the Commonwealth of Massachusetts Community Antenna Television Commission to file its opposition to the Stay Request and Appeal of Harron Communications Corporation IS GRANTED. The due date for the opposition is now **August 1, 1994.** This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. §0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[1] The local franchising authority is charged with regulating the basic tier and equipment rates of cable operators with its franchise area pursuant to the Cable Television Consumer Protection and Competition Act, Pub.L. No. 102-385, 106 Stat. 1460 (1992), §§543 and 544; Communications Act, §§623 and 624.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NEW	Amesbury, MA 0049
ENGLAND	Essex, MA 0153
CABLEVISION	Gloucester, MA 0136
OF	Manchester, MA 0154
MASSACHUSETTS,	Merrimac, MA 0162
INC.	Rockport, MA 0137
Petitioner	Salisbury, MA 0165

v.

COMMONWEALTH OF MASSACHUSETTS
COMMUNITY ANTENNA TELEVISION
COMMISSION
Respondent

ORDER

Adopted: July 5, 1994; Released: July 5, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. In this Order, we grant the Motion for Extension of Time requested by the Massachusetts Community Antenna Television Commission ("Massachusetts Commission") in which to file its opposition to an appeal from the rate order of the Massachusetts Commission filed by New England Cablevision of Massachusetts, Inc. ("New England").[1]

II. BACKGROUND

2. The Massachusetts Commission reports that as a local franchising authority under the Cable Act, it has recently issued 240 rate orders applicable to cable operators conducting business in Massachusetts.[2] Following release of the rate orders, several cable operators filed appeals with this Commission. New England filed its appeal on June 20, 1994. The Massachusetts Commission requests an extension to August 1, 1994 of the due date for its opposition to the appeal by New England.

III. DISCUSSION

3. The Massachusetts Commission requests the extension of time to file its opposition to the appeal of New England to enable it to better perform its regulatory responsibilities. In its Motion, the Massachusetts Commission states that it has recently released 240 rate orders, that several of the affected cable operators have filed appeals of those orders, and that the Massachusetts Commission staff is also responsible for various additional regulatory concerns, including cost-of-service filings. New England does not oppose the request for the extension of time.

4. It is the policy of the Commission that extensions of time shall not be granted routinely. The parties are reminded that they are expected to comply with deadlines set forth in the Commission's Rules and should not assume the grant of such motions in the future. However, there are no objections to this particular Motion.

5. We will grant the extension due to the considerable demands placed on the Massachusetts Commission as the local franchising authority for the entire Commonwealth of Massachusetts and due to the fact that the cable operator does not oppose the requested extension.

IV. ORDERING CLAUSE

6. Accordingly, IT IS ORDERED, that the Motion for Extension of Time of the Commonwealth of Massachusetts Community Antenna Television Commission to file its opposition to the Appeal of New England Cablevision of Massachusetts, Inc. IS GRANTED. The due date for the opposition is now **August 1, 1994.** This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. §0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[1] The Massachusetts Commission originally requested an extension applicable to the appeal filed by New England as well as New England's request for a stay. The Massachusetts Commission subsequently amended its motion to apply to the appeal only.

[2] The local franchising authority is charged with regulating the basic tier and equipment rates of cable operators with its franchise area pursuant to the Cable Television Consumer Protection and Competition Act, Pub.L. No. 102-385, 106 Stat. 1460 (1992), §§543 and 544; Communications Act, §§623 and 624.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLEVISION	Acton, MA 0196
OF BOSTON	Bedford, MA 0210
LIMITED PARTNERSHIP	Boston, MA 0182
A-R CABLE	Brookline, MA 0219
SERVICES, INC.	Braintree, MA 0217
AND	Fitchburg, MA 0015
CSC	Gardner, MA 0016
ACQUISITION	Georgetown, MA 0133
MA, INC.	Groveland, MA 0071
Petitioner	Haverhill, MA 0031
v.	Hudson, MA 0139
COMMONWEALTH	Leominster, MA 0017
OF	Lexington, MA 0140
MASSACHUSETTS	Lunenburg, MA 0077
COMMUNITY	Lynnfield, MA 0167
ANTENNA	Maynard, MA 0146
TELEVISION	Norwood, MA 0148
COMMISSION	Peabody, MA 0119
Respondent	Stow, MA 0256
	Sudbury, MA 0255
	Templeton, MA 0127
	Westminster, MA 0230
	Westwood, MA 0204

ORDER

Adopted: July 5, 1994; **Released: July 5, 1994**

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. In this Order, we grant the Motion for Extension of Time requested by the Massachusetts Community Antenna Television Commission ("Massachusetts Commission") in which to file its opposition to an appeal from the rate order of the Massachusetts Commission filed by Cablevision of Boston Limited Partnership, A-R Cable Services, Inc. and CSC Acquisition - MA, Inc. ("Cablevision").

II. BACKGROUND

2. The Massachusetts Commission reports that as a local franchising authority under the Cable Act, it has recently issued 240 rate orders applicable to cable operators conducting business in Massachusetts.[1] Following release of the rate orders, several cable operators filed appeals with this Commission. Cablevision filed its appeal on June 20, 1994. The Massachusetts Commission requests an extension to August 1, 1994 of the due date for its opposition to the appeal by Cablevision.

III. DISCUSSION

3. The Massachusetts Commission requests the extension of time to file its opposition to the appeal of Cablevision to enable it to better perform its regulatory responsibilities. In its Motion, the Massachusetts Commission states that it has recently released 240 rate orders, that several of the affected cable operators have filed appeals of those orders, and that the Massachusetts Commission staff is also responsible for various additional regulatory concerns, including cost-of-service filings. Cablevision does not oppose the request for the extension of time.

4. It is the policy of the Commission that extensions of time shall not be granted routinely. The parties are reminded that they are expected to comply with deadlines set forth in the Commission's Rules and should not assume the grant of such motions in the future. However, there are no objections to this particular Motion.

5. We will grant the extension due to the considerable demands placed on the Massachusetts Commission as the local franchising authority for the entire Commonwealth of Massachusetts and due to the fact that the cable operator does not oppose the requested extension.

IV. ORDERING CLAUSE

6. Accordingly, IT IS ORDERED, that the Motion for Extension of Time of the Commonwealth of Massachusetts Community Antenna Television Commission to file its opposition to the Appeal of Cablevision of Boston Limited Partnership A-R Cable Services, Inc. and CSC Acquisition - MA, Inc. IS GRANTED. The due date for the opposition is now **August 1, 1994.** This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. §0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[1] The local franchising authority is charged with regulating the basic tier and equipment rates of cable operators with its franchise area pursuant to the Cable Television Consumer Protection and Competition Act, Pub.L. No. 102-385, 106 Stat. 1460 (1992), §§543 and 544; Communications Act, §§623 and 624.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TIME WARNER ENTERTAINMENT CO., L.P. d/b/a TIME WARNER CABLE of ATHOL
Petitioner

Athol, MA 0013
Orange, MA 0014

v.

COMMONWEALTH OF MASSACHUSETTS COMMUNITY ANTENNA TELEVISION COMMISSION
Respondent

ORDER

Adopted: July 5, 1994; **Released: July 5, 1994**

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. In this Order, we grant the Motion for Extension of Time requested by the Massachusetts Community Antenna Television Commission ("Massachusetts Commission") in which to file its opposition to an appeal from the rate order of the Massachusetts Commission filed by Time Warner Entertainment Co., L.P. d/b/a Time Warner Cable of Athol. ("Time Warner").

II. BAKCGROUND

2. The Massachusetts Commission reports that as a local franchising authority under the Cable Act, it has recently issued 240 rate orders applicable to cable operators conducting business in Massachusetts.[1] Following release of the rate orders, several cable operators filed appeals with this Commission. Time Warner filed its appeal on June 20, 1994. The Massachusetts Commission requests an extension to August 1, 1994 of the due date for its opposition to the appeal by Time Warner.

III. DISCUSSION

3. The Massachusetts Commission requests the extension of time to file its opposition to the appeal of Time Warner to enable it to better perform its regulatory responsibilities. In its Motion, the Massachusetts Commission states that it has recently released 240 rate orders, that several of the affected cable operators have filed appeals of those orders, and that the Massachusetts Commission staff is also responsible for various additional regulatory concerns, including cost-of-service filings. Time Warner does not oppose the request for the extension of time.

4. It is the policy of the Commission that extensions of time shall not be granted routinely. The parties are reminded that they are expected to comply with deadlines set forth in the Commission's Rules and should not assume the grant of such motions in the future. However, there are no objections to this particular Motion.

5. We will grant the extension due to the considerable demands placed on the Massachusetts Commission as the local franchising authority for the entire Commonwealth of Massachusetts and due to the fact that the cable operator does not oppose the requested extension.

IV. ORDERING CLAUSE

6. Accordingly, IT IS ORDERED, that the Motion for Extension of Time of the Commonwealth of Massachusetts Community Antenna Television Commission to file its opposition to the Appeal of Time Warner Entertainment Co., L.P. d/b/a Time Warner Cable of Athol IS GRANTED. The due date for the opposition is now **August 1, 1994.** This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. §0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[1] The local franchising authority is charged with regulating the basic tier and equipment rates of cable operators with its franchise area pursuant to the Cable Television Consumer Protection and Competition Act, Pub.L. No. 102-385, 106 Stat. 1460 (1992), §§543 and 544; Communications Act, §§623 and 624.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications — AAD 94-56
Elimination of
Reporting Requirements

ORDER

Adopted: July 18, 1994 **Released: July 21, 1994**

By the Acting Chief, Common Carrier Bureau:

1. In this Order, we relieve AT&T Communications (AT&T) of certain reporting requirements the Commission imposed in 1985 with respect to International Services Other Than Message Telephone Service (non-IMTS). [1] AT&T was required to file an accounting and cost allocation plan to segregate and identify separately the costs and revenues attributed to International Message Telephone Service (IMTS) and non-IMTS services. [2] In the *International Competitive Carrier Order,* the Commission found AT&T to be dominant in the IMTS market, but non-dominant in the non-IMTS market, hence creating the potential for improper cross-subsidization. In reviewing AT&T's accounting and cost allocation plan, the Common Carrier Bureau required AT&T to maintain, for each account affected by that plan, data showing the costs that were apportioned to non-IMTS offerings during each calendar quarter, and to report the data to the Commission annually. [3]

2. In the *Competition in the Interstate Interexchange Marketplace Order* [4] , the Commission concluded that there was insufficient evidence at that time to assess the competitiveness of IMTS. Since 1985, however, AT&T's share of the IMTS market has dropped steadily, from 97.4 percent in 1985 to just over 71 percent in 1992. [5] Today there are 13 facilities-based international carriers and 165 resale carriers offering IMTS service in the United States, with AT&T, MCI and Sprint providing 97.9 percent of the service based on the total minutes of IMTS traffic that originate or terminate in the United States. [6] Based on minutes of use, each of AT&T's 25 largest IMTS service areas is also served at a minimum by MCI and Sprint. [7] These carriers also offer direct dial international service to most of the same international service areas. [8]

3. Moreover, we no longer use AT&T's non-IMTS cost reports in our review of AT&T's IMTS rates or for any other purpose. Therefore, it appears that while these reports were necessary initially, they have outlived their usefulness. In keeping with the Commission's desire to reduce unnecessary regulation, we believe it appropriate to eliminate this outdated reporting requirement. We reserve the right, however, to require this information from AT&&T should we need it in the future.

4. Accordingly, IT IS ORDERED that the annual cost data reporting requirements placed on AT&T for its non-IMTS services ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

A. Richard Metzger, Jr.
Acting Chief, Common Carrier Bureau

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[1] International Competitive Carrier Policies, CC Docket No. 85-107, 102 FCC 2d 812 (1985) (*International Competitive Carrier Order).* Cross-subsidization involves shifting costs associated with competitive services to relatively non-competitive services. If the carrier's rates reflect the cost shifting, rates for competitive services may become predatory, while rates for monopoly services become artificially inflated.

[2] *Id.* at paras. 54-61.

[3] American Telephone & Telegraph Company's Accounting and Cost Allocation Plan for International Service Other Than Message Telephone Service, CC Docket 85-107, 1 FCC Rcd 984, 986, para. 21 (Com. Car. Bur. 1986) (*AT&T Cost Allocation Order).* n

[4] Competition in the Interstate Interexchange Marketplace, Report and Order, 6 FCC Rcd 5908 (1991).

[5] AT&T's IMTS market share was 97.4 percent in 1985; 94.6 percent in 1986; 92.4 percent in 1987; 89.8 percent in 1988; 83.8 percent in 1989; 79.0 percent in 1990; 74.4 percent in 1991, and 71.1 percent in 1992. Linda D. Blake, James Lande and Kenneth B. Stanley, Trends in the International Communications Industry, Table 11, (March 1994).

[6] 1992 Section 43.61 International Telecommunications Data, Common Carrier Bureau's Industry Analysis Division, Table E1, Market Shares - Message Telephone Service (December 7, 1993).

[7] *Id.* The usage data for each of these service areas encompass all AT&T IMTS calls between the United States and a given foreign country. For instance, Canada was AT&T's largest IMTS service area during 1992. Both MCI and Sprint also serve Canada.

[8] *Id.* MCI and Sprint respectively serve approximately 80 percent and 67 percent of AT&T's IMTS service areas.

Before the
Federal Communications Commission
Washington, D.C. 20554

G.C. Docket No. 93-153

In the Matter of
Amendment of the Commission's
Rules to Implement Section 4(g)(3)
of the Communications Act of 1934,
as Amended, 47 U.S.C. § 154(g)(3),
the Commission's Statutory Gift
Acceptance Authority.

REPORT AND ORDER

Adopted: June 24, 1994; Released: July 22, 1994

By the Commission:

I. INTRODUCTION

1. In this *Report and Order*, the Commission adopts rules to implement new section 4(g)(3) of the Communications Act, 47 U.S.C. § 154(g)(3), which gives the Commission authority to accept unconditional gifts, donations and bequests. Specifically, section 4(g)(3) authorizes the Commission, in furtherance of its functions, " to accept, hold, administer, and use unconditional gifts, donations, and bequests of real, personal, and other property (including voluntary and uncompensated services, as authorized by section 3109 of Title 5, United States Code). *See* 47 U.S.C. § 154(g)(3)(A). Congress stipulated, however, that the Commission's regulations implementing its section 4(g)(3) authority must "include provisions to preclude the acceptance of any gift, bequest or donation that would create a conflict of interest or the appearance of a conflict of interest." *See* 47 U.S.C. § 154(g)(3)(D).

II. BACKGROUND

2. As detailed in our *Notice of Proposed Rulemaking (NPRM)*, 8 FCC Rcd. 4154 (1993), in order to implement the conflict of interest restriction described above, we sought guidance from the policies of other Federal agencies, the provisions of the new Office of Government Ethics' (OGE's) government-wide standards of employee conduct, [1] and General Services Administration (GSA) regulations implementing agency acceptance of travel reimbursement. [2] Apart from new section 4(g)(3), we found no other agency gift acceptance statute which contains conflict of interest limitations. [3] We did, however, discover that several of the Federal entities with gift and bequest authority *(e.g.,* the Department of the Treasury (Treasury) and the Department of Health and Human Services(HHS)) have themselves imposed conflict of interest restrictions on, or developed general policies relating to, such authority. We incorporate herein by reference our discussion of these policies and provisions and the purpose and function of conflict of interest regulations as found in sections II, III and IV of our *NPRM*.

3. Members of the public were invited to comment on the specific proposals set forth in section IV of our *NPRM*, as well as to submit other proposals. Comments were received from the following entities: 1) AMSC Subsidiary Corporation (AMSC); 2) American Radio Relay League, Inc. (ARRL); 3) Association of Federal Communications Consulting Engineers (AFCCE); 4) Community Broadcasters Association (CBA); 5) National Association of Shortwave Broadcasters (NASB) and 6) United States Telephone Association (USTA). No reply comments were received.

III. DISCUSSION

A. *Decision Regarding Alternative Proposals*

4. In our *NPRM*, we sought comment on two alternative proposals that could be used to satisfy the statutory conflict of interest requirement. One possible approach was suggested in a letter from four members of the Senate Committee on Commerce, Science and Transportation; namely, that we implement section 4(g)(3) by precluding altogether gifts made by Commission regulatees or other persons who have an interest in the outcome of Commission decisions. [4] We noted in our *NPRM*, however, that this approach seemed inconsistent with the fundamental purpose of section 4(g)(3) to serve as a revenue enhancing measure. [5] Therefore, we also sought comment on various alternative approaches that would allow the agency access to needed resources, and which are more flexible than imposing an absolute bar on the Commission's receipt of gifts from regulated entities.

5. None of the parties who filed comments in this proceeding endorsed an absolute bar. And, as discussed in our *NPRM*, we continue to believe that imposing an absolute ban would exclude a vast number of potential donors,

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[1] As explained in our *NPRM*, because the OGE standards expressly do not govern matters that are authorized by agency gift acceptance statutes or regulations promulgated thereunder, the OGE rules governing gifts to individual employees do not apply to any gifts to the Commission that are accepted under section 4(g)(3) authority. 8 FCC Rcd. 4154, 4156, para. 11 (1993).

[2] Our *NPRM* emphasized that GSA's regulations are especially relevant to any conflict of interest standards we might develop because GSA's rules appear to be the principal government standards applicable to an agency's, rather than an individual employee's, acceptance of benefits. *Id.* at para. 13.r

[3] *Id.* at para. 3. As noted in our *NPRM*, at the same time Congress enacted section 4(g)(3), it enacted a provision prohibiting the Commerce Department from soliciting gifts for the National Telecommunications and Information Administration (NTIA), where such solicitation would create a conflict of interest or the appearance thereof. As we pointed out in our *NPRM*, NTIA's conflict of interest provision only applies to circumstances in which gifts are solicited. *Id.* at n.2

[4] *See* Letter of October 9, 1992 to then Chairman Sikes from Senators Danforth, Stevens, Inouye and Gorton, United States Senate Committee on Commerce, Science and Transportation.

[5] *See* 138 Cong. Rec. H11732 (daily ed. October 5, 1992) (remarks of Rep. Rinaldo) (FCC's gift authorization is intended to assist the Commission in meeting "its increasing regulatory responsibilities given current budget constraints . . . .").

particularly regulated entities, who may be the most likely donors of equipment or other services that would be useful to the Commission in achieving more efficient performance of its regulatory functions. In this regard, in our *NPRM*, we compared the General Services Administration's (GSA's) regulations implementing section 1353, the statute which authorizes gifts of travel reimbursement. We noted that GSA refused to impose a flat ban on travel payments made by regulated sources, concluding that such an approach would be an "unreasonable regulatory limitation" in view of section 1353's clear intent to permit agencies with tight travel budgets to benefit from travel payments donated from outside sources. According to GSA, the groups most likely to pay travel expenses in order to hear a government speaker would be those whose activities are affected by the agency's programs. 8 FCC Rcd. at 4185. Similarly, commenters point out here that regulated groups are the entities most likely to provide the technical and other assistance to the Commission. In support of this position, AFCCE also notes that the engineering assistance it seeks to provide to the Commission benefits the telecommunications industry in general, not just the association or individual equipment manufacturers. [6] Furthermore, because regulated entities are often the only source for prototype equipment that sh ould be tested prior to the development of technical standards or other applicable regulations, we also believe the imposition of less restrictive gift acceptance regulations could significantly assist in the timely introduction of new technologies into the marketplace.

6. In addition, as discussed in our *NPRM*, [7] gifts to agencies do not necessarily involve the same type or degree of conflicts or appearance concerns as those of personal gifts made to employees with decisionmaking responsibility -- the focus of most traditional conflict of interest regulations, such as the OGE standards of employee conduct. We therefore concluded that, in the context of agency gift acceptance, more flexible approaches could be used. Commenters agreed with the conclusion reached in our *NPRM* that less restrictive policies can be formulated which adequately address conflict of interest concerns. Accordingly, we have decided to reject an absolute bar and to construe section 4(g)(3) in a flexible manner that will better achieve its statutory objective and promote the performance of the Commission's regulatory functions. The more flexible rules adopted here are discussed in detail below.

B. *Description of New Rules*

7. The regulations adopted in this *Order* [8] contain certain structural safeguards and absolute prohibitions designed to avoid both conflicts of interest and appearance concerns. In addition, the regulations impose mandatory factors that authorized agency ethics officials must consider in determining whether conflicts or appearances problems exist. Finally, the regulations contain public disclosure and reporting requirements that are intended to minimize or eliminate appearances problems. We believe that these mechanisms work together effectively to eliminate the conflicts of interest and appearances concerns.

8. As our *NPRM* observed, section 4(g)(3) itself contains a "built in" restriction that is intended to preclude one of the most fundamental concerns addressed in other conflict of interest statutes -- the concern that Federal employees might accept gifts in return for the performance or nonperformance of official duties. Unlike some agency gift acceptance statutes, section 4(g)(3) expressly limits the Commission's gift acceptance authority to gifts that are "unconditional," and thus effectively precludes gifts that are made contingent on official action. As noted in our *NPRM*, we believe the limitation is critical to ensure that the section 4(g)(3) prohibition on conditional gifts is carefully and scrupulously observed and to guard against any potential that official action could be influenced by gifts. In order to verify that the donor's gift is made without condition, our regulations impose specific requirements on the donor, which are discussed in detail below.

1. *Structural Rules and Prohibitions*

a. *Permissible Points of Agency Contact*

9. In our *NPRM*, we stated that one important tool in avoiding conflicts of interests and appearance issues might be to insulate agency officials with programmatic responsibilities, to the extent possible, from involvement in determinations regarding gift acceptance, as well as from discussions with potential donors regarding gifts. Therefore, similar to the policies of the Department of Treasury, our regulations will require agency employees who receive gift overtures from potential donors to refer all such matters immediately to the Commission's designated agency ethics official (DAEO), who will, as appropriate, consult with other agency ethics officials. Potential donors are also directed to contact the DAEO directly rather than contacting agency employees. In endorsing this approach, USTA agrees that "no gift could be directed toward a specific agency official or employee with direct regulatory or policy-making authority and no agency official or employee with direct regulatory or policymaking authority would have the responsibility of determining whether or not to accept such a gift." [9] Under the new regulations, the DAEO may advise the donor of the availability of a gift fund, the types of equipment, property, or services that may be of use to the Commission, and the proper procedures for effectuating gifts. [10]

b. *Ban on Solicitation/Cash Gifts*

10. As specified in part IV of our *NPRM*, we agree with the view expressed in HHS' policies that an agency's solicitation of gifts from entities whose interests are affected by such agency's programs raises the greatest potential for

[6] Comments of AFCCE at 2.
[7] 8 FCC Rcd. at 4158, para. 27.
[8] The regulations are comprised of five separate sections. The first section sets forth the purpose and the scope of the regulations. The second provision defines key terms which track the definitions found in the OGE standards of conduct. The remaining sections incorporate the three classes of regulatory mechanisms outlined in section IV of our *NPRM*.
[9] Comments of USTA at 2.
[10] In performance of this function, the DAEO would serve as a buffer between the donor and the Commission's operating bureaus. Agency ethics officials would, of course, be permitted to obtain information from the Commission's bureaus and offices about the types of equipment, property and services that generally may be of use to the Commission.

concern with regard to possible conflicts of interest. We are therefore imposing two restrictions which are fully supported by USTA. First, the regulations contain an absolute bar on Commission solicitation of gifts from regulated entities and others identified as prohibited sources under the new OGE standards of conduct. Second, to ensure that there is no potential for abuse, the regulations prohibit the acceptance of cash gifts and require that all monetary gifts be made check.

c. ***Food, Drink and Travel Reimbursement***

11. We also agree, as expressed in our *NPRM*, with the policies of other agencies that conflicts of interest and appearance problems may be greatest when gifts made to the agency appear to enure more to the personal benefit of employees. Although commenters did not address whether certain types of gifts should be prohibited altogether, to avoid this problem the regulations preclude the Commission's acceptance of food and drink under section 4(g)(3). Such gifts are commonly associated with Commission employees' attendance at conventions, meetings and other widely-attended events. Acceptance of these types of gifts will continue to be governed by the OGE standards of employee conduct, which provide for the employee's acceptance of such gifts, or pursuant to other independent authority. [11]

12. In addition, the regulations direct that Commission employees will not accept under section 4(g)(3) gifts of travel expenses for attendance at meetings that are governed by the GSA regulations implementing 31 U.S.C. § 1353, the government-wide travel reimbursement statute. [12] This rule is necessary because the GSA rules implementing section 1353 prohibit agencies from using general gift acceptance statutes to accept travel reimbursement for attendance at meetings that are covered by that section.

13. As we noted in the *NPRM*, however, GSA's rules implementing section 1353 specify that section 1353 does not govern the acceptance of travel and related expenses for attendance at, or participation in, meetings or events that are required to carry out an agency's statutory or regulatory functions. [13] Thus, because these sorts of meetings are outside the purview of section 1353's coverage, agencies are not precluded from accepting travel reimbursement for them using the authority of general gift acceptance statutes. In this regard, two commenters, AMSC and NASB, supported use of section 4(g)(3) to permit the Commission's acceptance of unsolicited contributions from Commission licensees in order "to defray the cost of participation in international frequency coordination activities." [14] AMSC stressed that the Commission's rules should be consistent with accepting "revenue enhancement from entities whose interests are aligned with those of the Commission." [15] While observing that the Commission has put tremendous resources into international satellite coordination meetings in the past, NASB expressed concern "that limited Commission resources could make it increasingly difficult for the Commission to continue the same level of effort in the future." [16]

14. We agree with these commenters that, because there are substantial public interest benefits to be gained, the Commission should permit travel reimbursement for attendance at, or participation in, government-sponsored meetings or events such as international coordination activities provided for by treaty. Therefore, to the extent that such meetings are deemed outside the scope of section 1353's coverage (because the meetings are required in order to carry out regulatory functions), we shall permit the acceptance of travel reimbursement for them under section 4(g)(3). [17]

2. ***Mandatory Factors in Evaluating Conflicts of Interest***

15. As proposed in our *NPRM* and supported by USTA,[18] the regulations require that where gifts are offered by regulated entities and similar sources, agency ethics officials with authority to accept the gift must undertake a careful analysis to determine whether the gift's acceptance reflects unfavorably on the Commission's ability to carry out its responsibilities in a fair and impartial manner. The factors required to be considered in such an analysis are discussed below. [19]

a. ***Benefits to Individual Employees/Employee's Role in Pending Matters Affecting the Donor***

16. We noted in the *NPRM* that conflicts of interest and appearance concerns are accentuated when the gift in question enures to the benefit of an employee personally and not just to the agency. Because of the possibility that some gifts offered pursuant to section 4(g)(3) might also provide tangible benefits to employees, the rules provide that of-

[11] *See, e.g.*, 5 C.F.R. § 2635.204(g)(4), providing for employees' acceptance of food and refreshments at widely attended gatherings of mutual interest to a number of parties.

[12] At the time our *NPRM* was issued, the Commission relied on section 4(g)(2) of the Communications Act, rather than 31 U.S.C. § 1353, as authority for the acceptance of travel reimbursement from non-Federal sources. In an October 4, 1993 letter to Stephen D. Potts, Director of the Office of Government Ethics, the Commission adopted a recommendation by OGE that the Commission should accept reimbursement for travel from non-Federal sources under 31 U.S.C. § 1353, as implemented by 41 C.F.R. part 304-1, rather than section 4(g)(2) of the Communications Act. In any event, we note that the *NPRM's* proposal to accept travel reimbursement under section 4(g)(3) for activities that are required to carry out statutory responsibilities, which is discussed in paras. 13-14, *infra*, was grounded on an analysis of section 1353, which we applied by analogy to section 4(g)(2). *See* 8 FCC Rcd. at 4159, n.21.

[13] *See* 5 C.F.R. § 304-1.2(c)(3) which makes clear that the term meeting pursuant to section 1353 "... does not include a meeting or other event required to carry out an agency's statutory or regulatory functions ...." 5 C.F.R. § 304-1.2(c)(3).

[14] Comments of AMSC at 1; comments of NASB at 1. NASB urged the Commission "to make an unequivocal finding that there is no conflict of interest in an HF broadcaster providing funds to support international coordination efforts by the agency's staff, including payments for staff salaries and expenses in attending meetings, the cost of renting rooms, etc." *Id.*

[15] *Id.* at 3.

[16] Comments of NASB at 2.

[17] In addition, gifts that do not enure to the personal benefit of employees and that are permitted under section 4(g)(3) might include, for example, donation of the use of facilities for FCC-sponsored conferences and other support services for such events, including teleconferencing facilities.

[18] Comments of USTA at 3.

[19] As we indicated in our *NPRM*, this conflict of interest analysis is not required unless gifts are offered by "prohibited sources," as defined in OGE rules.

ficials making conflicts of interests determinations must evaluate at the outset the extent to which benefits of the gift might accrue to individual employees. If the gift does benefit an individual employee, agency ethics officials must also go on to consider whether that employee is responsible for matters affecting the potential donor that are currently pending before the agency and the significance of the employee's role in any such matter. *See* 8 FCC Rcd. at 4159, para. 33.

b. ***Nature/Sensitivity of Pending Matters Affecting Donor and Value/Frequency of Donor's Gifts***

17. Whether or not the proposed gift benefits employees personally, the regulations we are adopting here direct agency officials making conflicts determinations to consider the nature and sensitivity of any matters pending at the Commission affecting the prohibited source and the timing of the gift. Although our *NPRM* indicated that we would not reject a gift on conflicts or appearances grounds merely because the donor has matters pending at the agency, the issue of sensitivity is heightened if a matter of substantial significance affecting the donor is currently pending before the Commission's Sunshine agenda at the time the gift is offered (or at the time the gift would be accepted.) Other factors that will be considered under the new rules are the value of the gift and the frequency of gifts made by a particular donor. We have decided, however, not to set any specific monetary or frequency limits. Commenters made no such recommendations and we believe this matter should be considered on a case-by-case basis.

c. ***Donor's Reason for Gift/Verification Gift is Unconditional***

18. In making conflict of interest determinations, the regulations also require ethics officials to consider the donor's reason for the proposed gift. As explained in our *NPRM*, if the donor's reason for the gift is a benefit that would accrue to all regulatees impartially (*e.g.*, the donor expects to benefit from increased efficiency at the Commission) or is to take advantage of related tax benefits, any "appearance" concerns associated with the gift are likely to be diminished. For purposes of considering this factor, the rules direct donors to supply a written statement specifying the reason for the intended gift and how they expect to benefit. Donors must also sign a verification that the proposed gift is not contingent on any promise or expectation that the Commission's receipt of the intended gift will benefit the donor in any regulatory matter.

3. ***Public Disclosure and Reporting Requirements***

19. Section 4(g)(3) does not impose a reporting requirement upon the Commission, but, because our gift acceptance authority is coupled with explicit conflict of interest limitations, we believe it is important to maintain a detailed record of all gifts. As discussed in section IV of our *NPRM*, some gift and bequest statutes, such as the Department of the Treasury's, expressly impose a requirement to make information regarding gifts to the Department publicly available. Treasury fulfills this obligation simply by placing a copy of the trust fund report in its library. 31 U.S.C. § 321(d). Similarly, the regulations we are adopting direct the Commission's Security Operations Office to maintain a publicly accessible record of all gifts accepted pursuant to section 4(g)(3). [20] The rules also require a semi-annual report to Congress listing the gift, donor and market value of gifts accepted from all sources pursuant to section 4(g)(3) authority.

20. Finally, in the *NPRM* we asked whether we should have a period of public notice before accepting gifts that have a high monetary value. USTA took the position that such a requirement is unnecessary because it is "unlikely that such comments would provide any additional information which would be helpful to the Commission in assessing potential conflicts of interest." [21] We generally agree. Nevertheless, we will leave it to the discretion of the DAEO whether to delay acceptance of any gift pending a period of public notice.

IV. CONCLUSION

21. We believe that, as mandated by section 4(g)(3), the regulations adopted here will preclude real and apparent conflicts of interest when the Commission exercises its new gift acceptance authority. In order to ensure the integrity of our process, we have, as discussed above, adopted numerous safeguards which will require careful consideration of conflicts of interest issues by impartial agency ethics officials. Our rules will also ensure that our actions implementing this authority are exposed to the fullest possible public and congressional scrutiny.

V. PROCEDURAL MATTERS

22. Accordingly, IT IS ORDERED That the Subpart R, Part 1 of the Commission's rules IS ADOPTED as set forth in the Appendix attached hereto, effective 30 days after publication in the Federal Register. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

23. The action taken herein is taken pursuant to sections 4(g)(3), 4(i), and 303(r) of the Communications Act, 5 U.S.C. §§ 154(g)(3), (i), 303(r). For further information on this proceeding, contact Sharon B. Kelley, Office of the General Counsel, Administrative Law Division, (202)632-6990.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[20] The record will contain the following information: 1) the identity of the source of the gift; 2) a description of the gift; 3) the market value of the gift; and 4) the date the gift is accepted. In addition, when gifts are from prohibited sources, the record will include documentation concerning the donor's reason for the gift and a signed statement of verification from the donor that the gift is unconditional.

[21] Comments of USTA at 4.?

APPENDIX

Part 1 of Title 47 of the Code of Federal Regulations is amended to read as follows:

PART I Practice and Procedure

1. The authority citation for Part I continues to read as follows:

Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303: Implement, 5 U.S.C. 552 and 21 U.S.C. 853a, unless otherwise noted.

2. A new subpart R, consisting of Sections 1.3000 through 1.3004 is added to Part 1 to read as follows:

Subpart R - Implementation of Section 4(g)(3) of the Communications Act: Procedures Governing Acceptance of Unconditional Gifts, Donations and Bequests

Sec.

1.3000 Purpose and Scope.
1.3001 Definitions.
1.3002 Structural rules and prohibitions.
1.3003 Mandatory factors for evaluating conflicts of interest.
1.3004 Public disclosure and reporting requirements.

1.3000 Purpose and Scope.

The purpose of this subpart is to implement the Telecommunications Authorization Act of 1992 which amended the Communications Act by creating section 4(g)(3), 47 U.S.C. § 154(g)(3). The provisions of this subpart shall apply to gifts, donations and bequests made to the Commission itself. Travel reimbursement for attendance at, or participation in, government-sponsored meetings or events required to carry out the Commission's statutory or regulatory functions may also be accepted under this subpart. The acceptance of gifts by Commission employees, most notably gifts of food, drink and entertainment, is governed by the government-wide standards of employee conduct established at 5 C.F.R. Part 2635. Travel, subsistence and related expenses for non-government-sponsored meetings or events will continue to be accepted pursuant to the Government Employees Training Act, 41 U.S.C. § 4111 or 31 U.S.C. §1353, and its General Services Administration's implementing regulations, 41 C.F.R. §304-1.8, as applicable.

§ 1.3001 Definitions.

(a) For purposes of this subpart:

(1) The term "agency" means the Federal Communications Commission;

(2) The term "gift" means any unconditional gift, donation or bequest of real, personal and other property (including voluntary and uncompensated services as authorized under 5 U.S.C. § 3109);

(3) The terms "agency ethics official," "designated agency ethics official," "employee," "market value," "person," and "prohibited source," have the same meaning as found in 5 C.F.R. §§ 2635.102, 2635.203.

§ 1.3002 Structural rules and prohibitions.

(a) General prohibitions. An employee shall not:

(1) Directly or indirectly, solicit or coerce the offering of a gift, donation or bequest to the Commission from a regulated entity or other prohibited source; or

(2) Accept gifts of cash pursuant to this subpart.

(b) Referral of offers to designated agency ethics official. Any person who seeks to offer any gift to the Commission under the provisions of this subpart shall make such offer to the Commission's Designated Agency Ethics Official. In addition, any Commission employee who is contacted by a potential donor or the representative thereof for the purpose of discussing the possibility of making a gift, donation or bequest to the Commission shall immediately refer such person or persons to the Commission's Designated Agency Ethics Official. The Designated Agency Ethics Official shall, in consultation with other agency ethics officials, make a determination concerning whether acceptance of such offers would create a conflict of interest or the appearance of a conflict of interest. The Designated Agency Ethics Official may also advise potential donors and their representatives of the types of equipment, property or services that may be of use to the Commission and the procedures for effectuating gifts set forth in this subpart. The Commission may, in its discretion, afford public notice before accepting any gift under authority of this subpart.

§ 1.3003 Factors for evaluating conflicts of interest.

No gift shall be accepted under this subpart unless a determination is made that its acceptance would not create a conflict of interest or the appearance of a conflict of interest. In making conflict of interest determinations, the Designated Agency Ethics Official shall consider the following factors:

(a) Whether the benefits of the intended gift will accrue to an individual employee and, if so --

(1) Whether the employee is responsible for matters affecting the potential donor that are currently before the agency; and

(2) The significance of the employee's role in any such matters;

(b) The nature and sensitivity of any matters pending at the Commission affecting the intended donor;

(c) The timing of the intended gift;

(d) The market value of the intended gift;

(e) The frequency of other gifts made by the same donor; and

(f) The reason underlying the intended gift given in a written statement from the proposed donor.

§ 1.3004 Public disclosure and reporting requirements.

(a) Public disclosure of gifts accepted from prohibited sources. The Commission's Security Operations Office, Office of the Managing Director, shall maintain a written record of gifts accepted from prohibited sources by the Commission pursuant to section 4(g)(3) authority, which will include:

(1) The identity of the prohibited source;

(2) A description of the gift;

(3) The market value of the gift;

(4) Documentation concerning the prohibited source's reason for the gift as required in section 1.3003(f);

(5) A signed statement of verification from the prohibited source that the gift is unconditional and is not contingent on any promise or expectation that the Commission's receipt of the gift will benefit the proposed donor in any regulatory matter; and

(6) The date the gift is accepted by the Commission.

(b) Reporting Requirements for all gifts. The Commission shall file a semi-annual report to Congress listing the gift, donor and value of all gifts accepted from any donor under this subpart.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY File No. I-T-C-94-298

Application for authority to
acquire and operate additional
facilities in the North Pacific
Cable (NPC) system.

ORDER AND AUTHORIZATION

Adopted: June 29, 1994; Released: July 22, 1994

By the Chief, International Facilities Division.

1. Upon consideration of the above-captioned uncontested application, filed by American Telephoone and Telegraph Company (AT&T) pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-298 IS GRANTED, and AT&T is authorized to:

a. acquire from Pacific Telecom Cable on an Indefeasible Right of User basis a one-half interest in and operate an additional 630 MAUO [1] in the NPC system;

b. acquire a one-half interest in and operate any necessary overseas connecting facilities; and

c. use said facilities to provide AT&T's regularly authorized services between the U.S. and Japan.

3. IT IS FURTHER ORDERED that the authority granted herein is subject to the terms and conditions set forth in the Commission's Memorandum Opinion, Order authorizing U.S. carriers to acquire capacity in the NPC system. [2]

4. This Order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 of the Commission's Rules and applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] A MAUO is a minimum assignable unit of ownership, which is a 64 kilobit per second equibalent.
[2] AT&T et al, 6 FCC Rcd 2870 (1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

ERRATUM

Released: July 14, 1994

ERRATUM TO FCC CABLE SERVICES BUREAU SURVEY

Due to an error in a written submission made by one of the cable operators that was included in the price survey of cable systems in the 25 largest U.S. cities that was prepared by the Cable Services Bureau of the FCC, which was released earlier today, the report on the survey contained information that understated the decline in rates experienced by subscribers. Based on the earlier information, the Bureau earlier reported that the rates for the "typical" subscribers served by all systems in the sample decreased by an average of 5.68% between August 1993 and July 14, 1994. The actual decrease is 7.27%. In addition, the Bureau earlier reported that the rates for "typical" subscribers served by all regulated systems in the sample decreased by an average of 6.63%. However, the actual decrease is 8.49%. Finally, the Bureau earlier reported that the rates for typical subscribers served by cost-of-service systems increased by 3.83% between August 1993 and July 14, 1994. The rates actually decreased by 7.30%.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: July 22, 1994

US WEST COMMUNICATIONS, INC. AND TELEPHONE UTILITIES OF WASHINGTON, INC. FILED A JOINT PETITION FOR WAIVER OF THE DEFINITION OF "STUDY AREA" CONTAINED IN PART 36, APPENDIX-GLOSSARY, AND SECTION 61.41(C) OF THE COMMISSION'S RULES AAD 94-74

Comment Date: August 15, 1994
Reply Date: August 29, 1994

On June 30, 1994, US West Communications, Inc. ("US West") and Telephone Utilities of Washington, Inc., d/b/a PTI Communications ("PTI/Washington") filed a joint petition for waiver of the definition of "study area" as set forth in Appendix-Glossary of Part 36 of the Commission's rules. This waiver would allow the parties to reflect the changes in their study area boundaries that would result from US West's sale of twenty-eight telephone exchanges in Washington to PTI/Washington. PTI/Washington also seeks a waiver of Section 61.41(c) of the Commission's price cap rules, 47 C.F.R. § 61.41, to exempt it from the price cap "All or Nothing" rule and allow it to continue to operate as cost company in the National Exchange Carrier Association's common line and traffic sensitive pools. The parties state that this transaction is pending before the Washington Utilities and Transportation Commission.

Interested parties may file comments on US West and PTI/Washingtons' petition on or before **August 15, 1994,** and reply comments on or before **August 29, 1994,** with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. Comments and reply comments should reference AAD 94-74. Four (4) copies should also be sent to Adrian Wright, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554, and one (1) copy should be sent to the Commission's contractor for public service record duplication: International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition may be obtained from the Accounting and Audits Division's public reference room, 2000 L Street, N.W., Room 812, Washington, D.C.; copies are also available from ITS at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally,* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Adrian Wright at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY File No. I-T-C-94-270

Application pursuant to
Section 214 of the Communications
Act of 1934, as amended, to
permit use of its Telstar 401,
402 and 403 satellites to continue
operation of channels of
communication between points in
the Caribbean Region, Central
America, Mexico and Canada

ORDER AND AUTHORIZATION

Adopted: June 1, 1994; Released: July 22, 1994

By the Chief, International Facilities Division:

1. The Commission has under consideration an application filed by American Telephone and Telegraph Company (AT&T), pursuant to Section 214 of the Communications Act of 1934, as amended, requesting authority to use its Telstar 401, 402 and 403 satellites to continue operations between the U.S. and points in the Caribbean Region, Central America, Mexico and Canada as had previously been provided via AT&T's Telstar 301, 302 and 303 satellites and leased transponders. [1] Columbia Communications Corporation (Columbia) filed comments and AT&T filed a reply.

2. Columbia does not oppose a grant of AT&T's application. Rather, Columbia requests that the Commission expeditiously announce that it will permit U.S.-licensed satellites to serve any point, domestic or international, to which they are technically capable of providing service, regardless of their original designation as a domestic or international licensee. Columbia states that under current policy restrictions, separate systems can only offer domestic service "ancillary" to the provision of international service. AT&T argues that Columbia is seeking to introduce an entirely separate subject in its comments on the instant application: whether non-INTELSAT international satellite systems should be permitted to provide domestic service. According to AT&T, Columbia's request does not affect the authority sought in the subject application and, therefore, should not delay its grant.

3. Upon consideration of AT&T's application, we find that the present and future public convenience and necessity require it grant. Columbia's comments do not provide any basis for delaying action on AT&T's application. Moreover, we note that the subject application is not the appropriate vehicle for considering the issues raised in Columbia's comments. The issues raised by Columbia are under consideration by the Commission and will be the subject of a separate proceeding addressing recent developments in transborder policy and separate systems policy.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-94-270 IS GRANTED and AT&T is authorized to use its Telstar 401, 402 and 403 satellites to continue the provision of communications between points in the United States and points in the Caribbean Region, Central America, Mexico and Canada, as was previously provided via AT&T's Telstar 301, 302 and 303 satellites and certain leased transponders.

5. IT IS FURTHER ORDERED that service provided via the Telstar 401, 402, and 403 satellites shall be consistent with existing consultations under Article XIV(d) of the INTELSAT Agreement.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this Order. *(See* 47 C.F.R. § 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] AT&T was authorized to use domestic transponders leased from GE Americom for communications with certain earth stations in Canada and Mexico. *AT&T*, 7 FCC Rcd 3769 (1992); *see also* File No. W-P-C-6762 (released March 18, 1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

IDB WORLDCOM SERVICES, INC.

Application for authority to acquire and operate facilities via the Pan American Satellite (PAS) system for service between the U.S. and Panama and the Dominican Republic. File No. I-T-C-94-287

ORDER AND AUTHORIZATION

Adopted: June 29, 1994; Released: July 22, 1994

By the Chief, International Facilities Division.

1. Upon consideration of the above-captioned uncontested application, filed by IDB Worldcom Services, Inc. (IDB) pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-287 IS GRANTED and IDB is authorized to:

a. lease and operate channels of communications between appropriately licensed earth stations in the U.S. and the PAS satellite system, connecting with similar circuits provided by IDB's correspondents in Panama and the Dominican Republic;

b. lease and operate any necessary domestic connecting facilities;

c. lease or own and operate facilities in an appropriately licensed U.S. earth station, to be used in conjunction with the space segment capacity authorized herein; and

d. use said facilities to provide international switched message service between the U.S., on the one hand, and Panama (30 64-kbps equivalent circuits) and the Dominican Republic (90 64-kbps equivalent circuits), on the other hand.

3. IT IS FURTHER ORDERED that this authorization is subject to Commission jurisdiction over the use of all space segment within the PAS system.

4. IT IS FURTHER ORDERED that neither IDB nor any persons or companies directly or indirectly controlling or controlled by IDB, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which IDB or any persons or companies controlling or controlled by IDB are parties.

5. IT IS FURTHER ORDERED that our authorization of IDB to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and Panama or the Dominican Republic -- that is, private lines which originate in the United States and terminate in Panama or the Dominican Republic or which originate in Panama or the Dominican Republic and terminate in the United States. In addition, IDB may not -- and IDB's tariff must state that IDB's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or Panama or the Dominican Republic end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon finding that Panama or the Dominican Republic affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order,* 7 FCC Rcd 559 (1991) *petitions for reconsideration pending.*

6. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreements entered into with its foreign correspondents with the Commission within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

7. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to §203 of the Communications Act, 47 U.S.C. §203 and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

8. IT IF FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

9. IT IS FURTHER ORDERED that the applicant shall file a separate Section 214 application for any additional circuits it seeks to operate via the PAS satellite system.

10. This Order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FCC 94-149

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992	)	PP Docket No. 93-21
Inquiry into Sports Programming Migration	)	

Final Report

Adopted: June 9, 1994 **Released: June 30, 1994**

By the Commission: Commissioner Quello concurring and issuing a statement; Commissioner Barrett issuing a statement.

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I. INTRODUCTION

1. Pursuant to the Cable Act of 1992, the Commission has conducted an examination of "the carriage of local, regional, and national sports programming by broadcast stations, cable programming networks, and pay-per-view services," and has attempted to determine "the extent to which preclusive contracts between college athletic conferences and video programming vendors have artificially and unfairly restricted the supply of the sporting events of local colleges for broadcast on local television stations."[1] The 1992 Cable Act also instructed the Commission to analyze the "economic causes and the economic and social consequences" of migration trends and to submit to Congress "such legislative or regulatory recommendations as the Commission considers appropriate."[2] As directed, the Commission

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[1] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 26, 106 Stat. 1460, 1502-03 (1992) ("1992 Cable Act" or "Cable Act of 1992").

[2] Id.

submitted to Congress an Interim Report on July 1, 1993.[3] The 1992 Cable Act also instructed the Commission to submit a "final report," on or before July 1, 1994.

2. The Commission began its sports programming migration inquiry with a Notice of Inquiry, released February 9, 1993.[4] We defined sports programming migration as "the movement of sports programming from broadcast television to a subscription medium (i.e., one for which viewers pay a fee)" and sought information on the exhibition of sports events on broadcast and subscription media since 1980.[5] The inquiry has focused on six sports -- professional football, basketball, baseball, and hockey, and college football and basketball -- which have had significant broadcast and non-broadcast exposure.[6]

3. Based on an extensive record, the Commission tentatively concluded in the Interim Report that National Football League ("NFL") and college basketball games had not migrated to subscription media. With respect to National Basketball Association ("NBA"), Major League Baseball ("MLB"), and National Hockey League ("NHL") games, the Commission found that no migration had taken place at the national level. At the local level, there had been some shifts from broadcast television to subscription media, but the Commission concluded that "local migration has been isolated and relatively slight."[7] We found no evidence that college football games had migrated to subscription media, but noted that further inquiry was needed to determine the impact of preclusive contracts between college football conferences and video programming vendors (including broadcast networks) on the availability of college football games to local television stations.

4. In preparation of this Final Report, the Commission requested supplementary material in the Further Notice of Inquiry.[8] We sought additional information on the recent NFL, NBA, and MLB television and cable contracts, on contracts between college conferences and broadcast and cable networks, on specific instances of possible local migration, and on the cost of subscribing to cable sports services. We noted that our assessment of the consequences of sports programming migration and of preclusive contracts would be based on a public interest assessment that encompasses more than antitrust

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[3] See Interim Report in PP Docket No. 93-21, 8 FCC Rcd 4875 (1993).

[4] Notice of Inquiry in PP Docket No. 93-21, 8 FCC Rcd 1492 (1993) ("Notice").

[5] The scope and availability of subscription media in earlier years was limited.

[6] We solicited comment on other sports and received a limited amount of information on them.

[7] Interim Report, 8 FCC Rcd at 4891.

[8] Further Notice of Inquiry in PP Docket No. 93-21, 9 FCC Rcd 1649, 1650-51 (1994) ("Further Notice"); see also Interim Report, 8 FCC Rcd at 4891.

concerns. The Further Notice also sought comment on whether there is a public interest in government action to promote free access to sports programming and invited proponents of government intervention to suggest remedial measures. It went on to seek comment on pay-per-view exhibition of sports events, the impact of expected substantial increases in subscription media channel capacity on the availability of sports on broadcast television, and the effect of sports antitrust exemptions on the sports programming market.[9]

5. With one exception, commenters on the Further Notice concurred with our conclusion that there had not been significant migration of sports programming from broadcast to subscription media. The Association of Independent Television Stations ("INTV") argued that the Commission should revise its definition of migration and that, in fact, significant migration of MLB games and college football games has taken place. INTV also is alone in arguing that preclusive contracts between college athletic conferences and video programmers have a significant impact on the availability of games for telecast by local television broadcast stations.

6. This Final Report is organized as follows: Section II contains findings regarding migration in individual sports, using the Commission's previously-adopted definition of migration; Section III addresses preclusive contracts with respect to college football; Section IV addresses the arguments for and against Commission "sports siphoning" rules; and Section V examines the sports antitrust exemptions. Section VI addresses a variety of policy issues, including the appropriate definition of migration, the impact of subscription media on the availability of sports other than the six on which we focused our inquiry, the NFL's plan to offer out-of-market games to sports bars and home satellite dish subscribers, and the potential causes and consequences of sports programming migration. Our recommendations and conclusions are in Section VII, and Section VIII addresses administrative matters.

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[9] These issues, and some others that overlap with our own lines of inquiry, are raised in a Letter from the Honorable Edward J. Markey, Chairman, Subcommittee on Telecommunications and Finance, Committee on Energy and Commerce, U.S. House of Representatives to the Honorable James H. Quello, Acting Chairman, Federal Communications Commission (July 22, 1993) ("Markey Letter"); see Further Notice, 9 FCC Rcd at 1651.

II. FINDINGS REGARDING MIGRATION IN INDIVIDUAL SPORTS

A. Professional Football

1. Background

7. The Interim Report found that professional football had not migrated from broadcast to cable television, noting that every regular season and post-season NFL game was available on broadcast television, at least in the home market of the visiting team.[10] In the Further Notice, we requested information on the NFL's new exhibition agreements entered into since the Interim Report. In particular, we sought comment on whether the movement of the National Football Conference ("NFC") games from CBS to Fox Broadcasting Company ("Fox") will affect the availability of games on broadcast television.[11]

2. Comments

8. According to the NFL, the League's television exhibition plan has remained essentially the same as it was under its prior contracts.[12] Under the new NFL broadcast and cable agreements, which extend through the end of the 1997 season, there will continue to be two or three Sunday games and one Monday night game broadcast each week in each market. There will also be Thanksgiving Day and Saturday broadcasts late in the season. NBC retains the rights to the American Football Conference ("AFC") regular season games and the AFC play-offs, including all AFC championship games, and has obtained exclusive broadcast rights to the 1996 and 1998 Super Bowl games. ABC will continue to have the right to air a package of Monday night games. All post-season games will be carried on one of the three broadcast networks, i.e., ABC, Fox or NBC.[13] TNT and ESPN will continue to share the rights to nationally televise one game each week, usually on Sunday night. TNT holds the right to carry Sunday night games during the first half of the season and ESPN will telecast nine regular season Sunday (and an occasional Thursday) night games and three pre-season games each season. ESPN's telecasts will be on an exclusive, nationwide basis, but ESPN (as well as TNT) will continue to be obligated to make its telecasts available to an over-the-air station in the home cities of the participating teams. According to ESPN and Turner

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[10] Interim Report, 8 FCC Rcd at 4880.

[11] Further Notice, 9 FCC Rcd at 1651-52. We also requested comment on the NFL's plans to scramble its satellite feeds and sell packages of games to home satellite dish owners and commercial establishments. Id. We will discuss this issue below in Section VI.C of this Final Report.

[12] NFL Comments at 3; see ESPN, Inc. ("ESPN") Comments at 1-2; see also Interim Report, 8 FCC Rcd at 4879-80 (for more detail on the prior contracts).

[13] NFL Comments at 3, 5; NBC Comments at 4.

Broadcasting System, Inc. ("Turner"), the NFL created Sunday night coverage specifically for cable, so local and national football broadcasts have not decreased because of cable coverage.[14]

9. One difference between the previous and current NFL agreements is the substitution of Fox for CBS as the network carrier of the NFC games.[15] Time Warner Entertainment Company, L.P. ("Time Warner"), asserts that the NFL/Fox deal, among other things, demonstrates broadcasters' unfettered ability to acquire rights when they want to and the continued relegation of cable programmers to bidding only on those games broadcasters don't want. Time Warner states that Fox's emergence as a network carrying sports programming will likely result in more migration back to broadcast television. Time Warner further notes that CBS reacted to losing the NFC games by purchasing the right to telecast Southeastern Conference ("SEC") and Big East Conference ("Big East") college football games on a national basis, not by withdrawing from sports programming. According to Time Warner, events since the Interim Report affirm its original comments, in that, among other things, (1) the Super Bowl will remain on broadcast television, (2) cable programmers were only able to bid on NFL games that NBC, ABC and Fox did not take, demonstrating a pattern of "broadcaster-first" rights negotiations, and (3) the NFL and MLB arrangements show that the leagues strive to maximize their revenues without migrating to cable.[16]

10. The NFL claims that its contract with Fox has enhanced the competitiveness of the broadcast marketplace. By increasing the number of fully competitive broadcast outlets, the NFL submits, the NFL/Fox deal should also improve the competitive posture of broadcast television networks as compared to subscription media in the sports programming marketplace. The NFL believes the result will be "less migratory pressure" on professional football and other sports programming for the foreseeable future.[17]

11. Fox believes that its carriage of NFC games will not have a negative impact on the aggregate availability of games on broadcast television. In an attempt to bring its nationwide coverage to a level more comparable to the other broadcast networks, Fox has acquired twelve new affiliates nationwide, including eight former CBS affiliates, three former ABC affiliates and one former NBC affiliate. The addition of the twelve stations brings Fox's penetration to 97 percent of the country, as opposed to the 92 percent it had when it

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[14] Turner Comments at 3; ESPN Comments at 1-2; ESPN Reply at 2-3; see also NFL Comments at 3-5.

[15] NFL Comments at 3. Another difference is that the Pro Bowl, which had been carried by ESPN since 1987, will move to ABC beginning next season. ESPN Comments at 1-2; NCTA Reply at 2.

[16] Time Warner Comments at 1-6.

[17] NFL Comments at 6-7.

signed the NFL agreement. Fox executives claim that "'The NFL was critical to this deal.'"[18]

3. Findings

12. No commenters in this proceeding allege that professional football has migrated from broadcast television to cable programming and pay-per-view networks, either at a national or local level.[19] Furthermore, the record does not demonstrate that the NFC games moving from CBS to Fox will have any significant effect on the availability of NFL games on broadcast television. As some parties have stated, Fox's movement into the sports programming marketplace may indeed benefit the industry by increasing competition and benefit consumers by increasing the number of broadcast outlets carrying sports programming. We are not, therefore, concerned at this time that professional football is migrating away from free television to subscription services.

B. Professional Basketball

1. Background

13. The Interim Report found no significant migration of professional basketball telecasts from broadcast to cable television, either at the national or the local level.[20] In the Further Notice, we requested any additional relevant information available on migration in the NBA context. Given that the NBA's national distribution contracts with NBC and Turner expire at the end of the 1993-94 season, we sought comment on the NBA's new contracts with NBC and TNT for national exhibition of league games, including the provisions limiting superstation telecasts and the status of the litigation over these provisions. We also specifically requested information on the decline in local exhibition of New York Knicks and Philadelphia 76ers games and on the Portland Trail Blazers games being offered through pay-per-view. More specifically, we sought comment on whether the 76ers had negotiated a new contract for local television broadcasts after the 1993-94 season and, if they had, the terms thereof.[21]

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[18] Fox: NFL Contract Key to New Affiliates, Washington Post, May 25, 1994, at B6; Fox Comments at 2-3.

[19] But see infra Section VI.C regarding the NFL scrambling its signal for home satellite dish owners and commercial establishments.

[20] Interim Report, 8 FCC Rcd at 4881.

[21] Further Notice, 9 FCC Rcd at 1652. We requested comment on the superstation telecast limitation because, under the agreement in effect through the end of the 1993-94 season, some local NBA flagship stations which are also superstations, such as WTBS, WGN and WWOR, were able to distribute games locally over the air and nationally by cable. See Interim Report, 8 FCC Rcd at 4880-4881. With the exception of WTBS, however, this is no

2. Comments

14. As a general matter, the NBA asserts that last season the number of regular season games carried by broadcast and cable television combined was the highest in NBA history. The NBA further states that 736 games were broadcast in the 1992-93 season by local over-the-air stations, representing an all-time high and an increase of nearly 60 percent over the 1982-83 season, the earliest year for which the NBA presented figures.[22]

15. The NBA has entered into new national exhibition agreements with NBC and with Turner. Both agreements are four years in duration and expire after the 1997-98 season. Under its new contract, NBC will carry up to 61 games each season, including a minimum of 25 regular season games, as well as up to 28 NBA play-off games in prime time. The NBA notes that this is more than twice the 26 network broadcasts carried in 1982-83 season, which included only seven regular season games. The NBA also states that under its contract with NBC, NBC has agreed to guarantee the NBA $750 million in rights fees. The contract provides that the NBA and NBC will share equally in advertising revenues if such revenues exceed an agreed upon benchmark. NBC notes that the agreement thus ties increases in rights fees to the underlying profitability of the television enterprise.[23]

16. The NBA's agreement with Turner provides that the Atlanta Hawks games will no longer be shown on Superstation WTBS, but will be licensed for local over-the-air broadcast and for regional cable carriage on SportSouth. WTBS will instead join TNT in carrying the NBA regular season games and a limited number of early play-off games. More specifically, TNT will carry 45 (down from 50) regular season games and will continue to carry 35 early play-off games; Superstation WTBS will carry 25 previously untelevised regular season games and ten new play-off games. With respect to the play-off games, TNT and WTBS will carry competing games, i.e., different games televised at the same time. Turner will also telecast certain special events related to the NBA All Star Game. Furthermore, the NBA informs us that Turner has agreed to guarantee the NBA $352 million in rights fees, and to share advertising revenues equally if they exceed a predetermined level.[24]

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longer the case under the new national agreements. See infra ¶¶ 16, 18-19.

[22] NBA Comments at 1-2. We note that the NBA has submitted revised figures which indicate that 690 games were broadcast locally during the 1992-93 season. See Ex Parte Letter from Philip Hochberg, Counsel for the National Basketball Association, to Jonathan D. Levy, Office of Plans and Policy, Federal Communications Commission (June 1, 1994).

[23] For details on the contracts, see NBA Comments at 1-2, 4-5, NBC Comments at 4-5, and Turner Comments at 1-2.

[24] Turner Comments at 1-2; NBA Comments at 4.

17. Both the NBC and the Turner contracts contain restrictions on the rights of the league to license broadcasts. The NBC agreement, for instance, prohibits the NBA and its teams from televising any game at the same time as NBC is televising an NBA game. The games televised by Turner, however, may be simultaneously broadcast in the local markets of the competing teams. According to Turner, nothing in the newly signed contracts changes the trend of cable telecasts reviving basketball's popularity, and local TV and radio revenues have not suffered as a result of the NBA's high cable profile.[25]

18. In response to our inquiry regarding the litigation over the NBA's restriction on superstation telecasts (also called the "Same Night Rule"), Tribune Broadcasting Company ("Tribune") informs us that its superstation, WGN-TV, and the Chicago Bulls have sued the NBA in the U.S. District Court for the Northern District of Illinois, alleging that the NBA's exclusivity provisions, which restrict superstation telecasts, violate federal antitrust law. The litigation is in the final stages of post-trial briefing, and is awaiting a decision.[26]

19. The NBA believes that its Same Night Rule, which prohibits any other national cable distribution of any NBA game on the same night as Turner is telecasting a game (either on WTBS or TNT), has no relevance to sports migration because the rule only restricts national cable networks (such as WGN) from telecasting an NBA game in the national market on the same night that the NBA's national cable carriers telecast a game. According to the NBA, the rule does not restrict the over-the-air broadcast of NBA games in the local markets of the competing teams.[27]

20. New York Knicks. Madison Square Garden Corporation ("MSG") asserts that the decline in the number of locally broadcast Knicks games that occurred at the end of the 1989-90 season was not a result of migration, but of New York broadcast stations' lack of interest in carrying a meaningful number of basketball games.[28] According to the NBA, local broadcast of sporting events is not as common in New York as in other major cities. Consequently, the NBA submits that, in order to present New York fans with a regular package of high quality game telecasts, the Knicks have found it necessary to distribute their games to the New York area on the MSG cable network.[29]

21. Philadelphia 76ers. Through the end of the 1993-94 season, the Philadelphia 76ers games were carried on a combination of WPHL-TV (a local over-the-air station owned.

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[25] NBA Comments at 5; Turner Comments at 1-2.

[26] Tribune Comments at 2-5.

[27] NBA Reply at 2, 4.

[28] MSG Comments at 3-4; see also NBA Comments at 4.

[29] NBA Comments at 3.

by Tribune), Prism (a premium cable sports and movie service serving the Philadelphia market), and SportsChannel (a regional cable sports service carried on the basic tier).[30] No 76ers games are distributed on a pay-per-view basis. Rainbow informs us that prior to the 1991-92 season Prism only held rights to the 76ers home games. Since that time, Prism has held the local rights to exhibit all Philadelphia 76ers games and has shown some 76ers games on SportsChannel Philadelphia, a basic service, and some on Prism, a premium service. For the first three years of its current seven-year contract with Prism, the 76ers could and did reacquire the rights to ten away games (seven regular season and three post-season games) solely for local broadcast. Rainbow states that all ten games were, in fact, broadcast locally during each of these three years. According to Tribune, WPHL broadcast seven 76ers games each year for three years ending with the 1993-94 season. Rainbow states that the local broadcaster was only willing to pay a fraction of the per-game license fee Prism had paid, but that Prism and the 76ers nevertheless agreed to accept the reduced rate. The team's right to license ten games for local broadcast expired at the end of the 1993-94 season, leaving all regular season games for the next four years controlled by cable. According to Rainbow, Prism is negotiating with local stations regarding licensing 76ers games for local broadcast. According to the NBA, the 76ers have not signed a new agreement with WPHL-TV covering the 1994-95 season; however, the 76ers expect this relationship to continue. INTV states that there has been no explanation for the 76ers leaving WPHL-TV, other than that the station's advertising base could not support the higher bid necessary to outbid the Prism cable network.[31]

22. Portland Trail Blazers. The NBA claims that, in order to protect home game attendance, the Portland Trail Blazers generally do not license their home games for local broadcast. According to the NBA, making the Trail Blazers' games available on pay-per-view provides Portland fans with the opportunity to view games previously unavailable on television, while continuing to protect game attendance.[32]

23. Denver Nuggets. Citing press reports, INTV informs us that the Denver Nuggets recently decided to move the telecast of their home play-off games to pay-per-view within a 35-mile zone surrounding Denver. Away games regularly appear on television broadcast station KWGN, Denver, and home games appear on Prime Sports Network ("PSN"), which is carried on the basic cable programming tier. The play-off games will continue to appear on PSN's basic service outside the 35-mile zone. According to INTV, PSN says that it cannot keep the play-off games on basic because advertising revenues will not support the higher rights fees; INTV claims that this situation demonstrates that migration

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[30] Id.; Rainbow Comments at 1-2. Rainbow Programming Holdings, Inc. ("Rainbow"), is the managing general partner of both Prism and SportsChannel.

[31] NBA Comments at 3; Rainbow Comments at 3-4; Tribune Comments at 5-6; INTV Reply at 55.

[32] NBA Comments at 4.

will continue at a local level.[33] According to an article submitted by INTV, the play-off telecast schedule does not indicate that the Nuggets regular season games will go to pay-per-view in the near future.[34]

24. Affiliated Regional Communications, Ltd. ("ARC"), claims that since the Interim Report, local broadcast coverage of NBA games has increased for each team with which an ARC service has entered or sought to renegotiate a contract. For example, on November 1, 1993, the Utah Jazz and Prime Sports Network-Intermountain West renewed their prior agreement which provides for carriage of five home games and twenty away games during the season. Local broadcast station KJZZ (co-owned with the Jazz) retains the rights to at least eight home and twenty away (a total of 28) regular season games and all away play-off games. In contrast, in the 1992-93 season, only 24 regular season Jazz games were scheduled for local broadcast.[35]

3. Findings

25. As stated above, the Interim Report found that there had not been any significant migration of professional basketball telecasts from broadcast to cable television, either at the national or the local level. We do not believe that the NBA's new exhibition agreements raise any additional concerns regarding the migration of professional basketball at a national level.[36] In fact, it appears that cable has simply supplemented broadcast television's carriage of basketball and provided consumers with more viewing choice.

26. We also find no evidence that significant migration of professional basketball is occurring at the local level. In general, cable sports carriage appears to supplement local broadcast television's coverage of professional basketball. With regard to the Knicks, commenters assert that any decline in local broadcast carriage is a result of a lack of broadcaster interest. With regard to the Denver Nuggets, the "migration" described by INTV is from basic cable service to pay-per-view service, and thus does not indicate sports migration as we have defined it. However, the Philadelphia 76ers' situation may well be a case of local migration, but the record before us does not clearly indicate the cause of the decline in broadcast coverage of 76ers games. Should cases of significant migration develop, we may revisit this issue in the future.

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[33] INTV Reply at 55-56.

[34] Nuggets Home Playoff Games on Pay-Per-View, Rocky Mountain News, April 19, 1994, at 5B.

[35] ARC Comments at 8.

[36] Although the new contracts restrict superstation telecasts, these provisions apparently are intended to limit cable carriage of local games. We do not believe that the superstation restrictions present a migration issue.

C. Professional Baseball

1. Background

27. The Interim Report found that there has been a significant decline in the number of national, regular season television broadcasts of MLB games. The report concluded that the drop in the national, regular season broadcasts appeared to be a function of declining ratings rather than of migration to cable.[37] The Interim Report also found that the record indicated some instances of migration at the local level. In the Further Notice, we invited comment on migration of national and local broadcasts, on MLB's new national contracts with ABC and NBC and with ESPN, and on changes in local broadcasts, especially the MSG and WPIX-TV agreement for over-the-air carriage of New York Yankees games.[38]

2. MLB's New National Broadcast Contract

a. Comments

28. MLB has entered into a joint venture with ABC and NBC called "The Baseball Network" ("TBN"). TBN will telecast twelve regular season games in the second half of the season and will exhibit the All Star game and all post-season games.[39] MLB has no guaranteed rights fees under the agreement. MLB instead will take 87.5 percent of advertising revenues from the games until sales top a specified level, after which MLB's share drops to 80 percent.[40]

29. MLB explains that TBN will produce and market all regular season and post-season telecasts on national broadcast network television. The first broadcast network telecast each season will be the All Star Game. A weekly telecast ("Baseball Night in America") will be aired during each of the twelve weeks following the All Star Game. Telecasts during the first six weeks will be presented over the ABC network, while telecasts during the final six weeks will be presented over the NBC network. The networks have exclusive rights for the twelve regular season dates, in that no regional or national cable service or over-the-air

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[37] Interim Report, 8 FCC Rcd at 4883.

[38] Further Notice, 9 FCC Rcd at 1652.

[39] This represents a decline in the number of regular season games from earlier baseball contracts.

[40] NBC Comments at 4; see also Big League Blackmail, Forbes, May 11, 1992, at 46. Under the four-year CBS contract that expired at the end of the 1993 season, CBS paid baseball $1.06 billion for national broadcast rights and lost upwards of $440 million.

broadcaster may telecast an MLB game on those dates.[41]

30. Under the new telecasting arrangement, TBN plans to produce a telecast for every one of the games to be played on the twelve telecast dates. Each telecast will then be delivered to that portion of the country in which it is likely to generate the greatest interest. MLB adds that, although fans will have access to twelve different network broadcasts of baseball during 1994, TBN will produce a total of up to 160 baseball telecasts for free television in 1994. Because all games on a given date will be telecast, TBN will have the ability to provide viewers with highlights and update coverage much the same as the networks do in their coverage of NFL regular season games. All regular season TBN telecasts will be broadcast in prime time in each time zone. TBN also seeks to generate viewer interest by televising regular season games on a regional, rather than on a national basis. By creating network-produced games of local interest during prime time, MLB anticipates that viewership will increase.[42]

31. Although changes have been made to improve ratings for regular season broadcasts, the focus of MLB telecasts has shifted from the regular season to the post-season. MLB has restructured the American and National Leagues and has created an additional round of approximately twenty play-off games. All additional games will be shown on broadcast television. Baseball clubs in each league have been realigned into three Divisions, resulting in a new round of play-offs (the Divisional Series). The Eastern and Central Division of each League contain five teams apiece, and the Western Division of each League contains four teams. At the end of the regular season, each League's three division winners and a "wild card" team (the second place team with the best record) will meet in the best-of-five divisional play-offs. The two winning teams then advance to the best-of-seven League Championship Series ("LCS"). MLB anticipates that by keeping more teams in contention for post-season play, the new format will increase fan interest and ratings will rise accordingly. MLB states that under the new telecasting arrangement, all post-season games will remain on free television. ABC and NBC will alternate coverage of the All Star Game and post-season games. The network telecasting the All Star Game will also carry the LCS, while the other network will carry the new Divisional Series and the World Series.[43]

32. MLB explains that the telecast of the LCS and Divisional Series will be regionalized. MLB states that under the CBS contract which expired at the end of the 1993 season, every LCS game was shown nationally. This required several games to be broadcast in the afternoon in order to accommodate all games in both leagues. In fact, baseball was the only professional sport that played post-season games during weekday afternoons. The result

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[41] MLB Comments at 22-25.

[42] Id. at 22-23.

[43] Id. at 4, 24-25.

was that ratings for daytime LCS games declined 37 percent between 1985 and 1993.[44] MLB has addressed this situation by organizing all Divisional Series and LCS games on a regional basis and by playing them in prime time. MLB believes that this will ensure that the game fans are most interested in will be available at a time most likely to be viewed. MLB adds that the World Series remains a national broadcast. INTV notes that the World Series will be the only nationally-broadcast MLB games. INTV contends that MLB's decision to move away from "national" telecasts and towards "regional" telecasts will make it more difficult for local stations to contract directly with local teams. However, INTV does suggest the new network arrangement responds to what it sees as a public demand for local baseball broadcasts in prime time.[45] MLB believes the changes were necessary to address the current market for baseball broadcasts. MLB agrees that the number of baseball telecasts on national network television has declined but argues that any decrease in free telecasts of baseball, even when accompanied by an increase in subscription telecasts, cannot be presumed to constitute migration. When considering the decline in the number of national, regular season television broadcasts of MLB games, MLB says the evidence suggests that declining ratings have been the most significant factor contributing to decreased broadcaster demand.[46] MLB believes that prime time regionalization of MLB games and its new contract structure represent a reasonable response to a weakened demand for national, regular season MLB games.

b. Findings

33. The information submitted regarding the number of national, regular season television broadcasts does not lead us to change our finding in the Interim Report that the drop in those broadcasts is a function of declining ratings rather than migration to cable. Although the significant decline in ratings during the period since 1980 may not be the only reason for the decrease in national regular season broadcasts, it is clearly a significant factor. The record has shown throughout this proceeding that ratings for national regular season games have declined significantly during the period since 1980. This has led to a weakened demand from broadcasters. Moreover, the terms of MLB's current national television contract are consistent with our conclusion. MLB has moved games to prime time, has shifted the composition of games to post-season, and has agreed to a national network contract with no guaranteed rights fees. This represents a substantial change from previous agreements, and illustrates the fact that MLB has been forced to accept more risk than other professional sports leagues.[47]

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[44] Id. at 24-25.

[45] INTV Comments at 9-11.

[46] MLB Comments at 5-6.

[47] MLB's agreement with ABC and NBC is riskier than other sports contracts, such as NBC's arrangements with the NBA and the NFL, which guarantee rights fees and bonuses. See supra ¶¶ 15-16; Fox's NFL Bid Drove Up Prices, Drove Out CBS, Broadcasting and

3. ESPN's Contract with MLB

a. Comments

34. In September 1993, ESPN reached an agreement with MLB to extend ESPN's contract for national cable distribution of MLB regular season games. The new contract calls for ESPN to distribute approximately 77 regular season MLB games in each of the 1994 through 1999 seasons. ESPN has no rights to any post-season games. The games include Sunday evening single games, Wednesday night double-headers, and double-headers on opening day, Memorial Day, Independence Day and Labor Day. The contract contains limited exclusivity provisions. According to MLB, the agreement with ESPN will provide more than 60 million households nationwide with access to baseball telecasts that may not otherwise have been available. MLB argues that the substantial consumer benefits of the ESPN package would not be possible absent a grant of exclusivity.[48]

35. ESPN has no exclusivity on opening day and holidays, limited regional exclusivity on Sunday, and broader exclusivity on Wednesdays. MLB states that ESPN does not have "blanket exclusivity" on Sunday nights. According to MLB, nothing in the ESPN contract prohibits any club from authorizing the telecast of a Sunday evening game by an over-the-air station (other than a superstation) or by a regional cable network -- unless ESPN makes that same game available within the clubs home territory (which it may do only a limited number of times each season). Furthermore, MLB adds that there are few Sunday night games in the current schedule and asserts that, prior to 1990 when ESPN began televising baseball, MLB clubs typically did not play on Sunday evenings. For example, of the approximately 340 games scheduled to be played on Sundays in 1989, the year prior to the ESPN contract, only twelve games were scheduled to start after 5:00 p.m. Eastern Time ("ET") -- six of which were Texas Rangers games which start late due to the heat.[49] MLB contends that Sunday night baseball is essentially a new product. MLB will showcase a different stadium from around the league during each Sunday night telecast.[50]

36. As for the Wednesday night exclusivity provisions, MLB states that no competing local, over-the-air telecasts or superstation telecasts are permitted. However, local and regional cable coverage is permitted on Wednesday nights. MLB notes that there are

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Cable, January 3, 1994, at 18-19.

[48] ESPN Comments at 2; MLB Comments at 32.

[49] MLB Comments at 3-5, 31-34. The ESPN agreement also does not place limits on Sunday afternoon telecasts.

[50] See Ex Parte Letter from Charlene Vanlier, Vice President and Washington Counsel for ABC, to Mr. William Caton, Acting Secretary, Federal Communications Commission (May 27, 1994) at 5.

some Wednesday games in the afternoon which are not restricted and that flagship stations would not necessarily televise all Wednesday night games. Flagship stations are broadcast stations licensed to the community in which a baseball team plays its home games. MLB adds that, on any given Wednesday night during 1989, two-thirds of the U.S. flagships were not televising baseball. Thus, many American households might not receive an over-the-air baseball telecast on a given Wednesday night regardless of whether ESPN was afforded exclusivity by MLB. MLB concludes that Wednesday night exclusivity notwithstanding, local broadcasters have far more games to choose from throughout the season than they have slots available to broadcast such games. MLB suggests that Wednesday exclusivity has just shifted locally televised games to other days. In fact, a broadcaster may televise approximately 140 games without offending the exclusivity provisions in MLB's national rights agreement.[51]

37. MLB provided output data for Wednesday broadcasts during the 1989 and 1994 seasons. MLB reports that there were 312 games played on Wednesdays in 1989, of which 40 were day games (4:05 p.m. ET or before), and 272 were night games. This represents 576 total telecasting opportunities (one game provides two telecasting opportunities -- one for each club).[52] In 1994, there will be 349 Wednesday games played of which 87 will be day games and 262 will be night games. This represents 648 total telecasting opportunities (taking into consideration that two expansion teams have been added to the league since 1989). MLB states that in 1989, despite the fact that flagship stations had the opportunity to broadcast 87 percent of the Wednesday evening games, only one-third of the flagship stations were broadcasting baseball on any given Wednesday.[53] INTV sugggests that this is a misleading statistic. It asserts that "one would expect that one-half of the flagship stations would not be broadcasting because they would be broadcasting a 'home' game."[54] To justify its contention, INTV refers to MLB's claim that teams are interested in protecting the live gate. Thus, of the 26 teams in 1989, thirteen visiting teams were available to their flagship stations on any given Wednesday night. INTV claims that, using MLB's data, two-thirds of the flagships that which could reasonably be expected to carry Wednesday games (9 visiting team flagship stations) were in fact broadcasting MLB games on Wednesday nights in 1989.

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[51] MLB Comments at 4-5, 7.

[52] Ex Parte Letter from Bruce A. Henoch, Counsel for the Office of the Commissioner of Baseball, to Jonathan D. Levy, Office of Plans and Policy, Federal Communications Commission (May 12, 1994). Telecasting opportunities for the Canadian teams are not included in the total.

[53] MLB Ex Parte Letter, supra note 52, at 3.

[54] Ex Parte Letter from David L. Donovan, Vice President, Legal and Legislative Affairs for Association of Independent Television Stations, Inc., to Jonathan D. Levy, Office of Plans and Policy, Federal Communications Commission (May 3, 1994); see also MLB Comments at 13-14.

38. MLB also submitted data on the number of flagship broadcasts by night of the week for the 1989 and 1994 seasons. MLB states that in 1989 there were an average of 36.1 flagship broadcasts on the five weeknights combined. In 1994, there is an average of 36.4 flagship broadcasts on Monday, Tuesday, Thursday and Friday nights combined.[55] MLB concludes that the ESPN contract has simply caused local broadcasters to carry more games on Monday, Tuesday, Thursday, and Friday to make up for the games no longer available. INTV asserts that ESPN's contract with MLB is a preclusive contract, in that it prohibits local stations from broadcasting games on Wednesday nights. INTV contends that this is especially egregious given that the exclusivity provision does not apply to regional pay cable channels. INTV also believes that ESPN has blanket exclusivity on Sunday nights. INTV concludes that ESPN's arrangement with MLB is nothing more than an attempt to limit output to enhance its competitive position, and suggests that the Commission should review ESPN's arrangement with MLB under the public interest standard of the Communications Act.[56]

b. Findings

39. We do not agree with INTV's assertion that the MLB agreement with ESPN is a preclusive contract as defined under the 1992 Cable Act. The Act discusses preclusive contracts when examining television coverage of college sports. Although the ESPN contract does contain exclusivity provisions, it is not considered a preclusive contract, even by analogy. After considering the total output of games, it seems clear that, although Wednesday nights do present a scheduling restriction for broadcasters, if the entire market is considered, the effect of the exclusivity provisions is more than offset by the available broadcast opportunities on other nights. Moreover, ESPN is providing 77 national games to 60 million households. While we understand INTV's concern that free over the air sports programming remain available to the broadcast television public, we cannot conclude that ESPN's contract with MLB presents a threat to free over-the-air broadcasts of baseball games.

4. Local Broadcasts

a. Comments

40. We found in the Interim Report that some instances of local migration had occurred. MLB contends that it is providing the American public with more "free" broadcasts on local television than at any time in the past. MLB states that, in 1994, 28 baseball flagship stations are scheduled to present a total of 1,707 regular season telecasts (1,582 if the two expansion teams are not considered). This represents an average of 66 regular season games to be played by each club that will be televised on free over-the-air flagship stations.

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[55] MLB Ex Parte Letter, supra note 52, at 5.

[56] INTV Comments at 5-9.

The 1,707 telecasts scheduled for 1994 represents a significant increase over the number of flagship telecasts presented in 1980 (the base year of this proceeding); the clubs presented a total of 1,392 flagship telecasts in that year. MLB adds that in assessing the amount of baseball programming available on free television, the Commission should consider the amount of baseball presented by regional broadcast networks (which consist of stations that rebroadcast the flagships' game telecasts). MLB states that 20 of the 26 baseball clubs have regional networks, and collectively there will be 188 regional broadcast affiliates in 1994. MLB concludes that cable programming services have provided fans across the country with additional viewing options, which offer a supplement to, not a substitute for, the telecasting of baseball by conventional broadcasters.[57]

41. INTV suggests that MLB's aggregate data on local telecasts mask a trend of migration of MLB games from local television. INTV examines the increase in local telecasts between 1980 and 1993 (which it calculates as 313 games) and claims that 270 of them (86 percent) should not be counted as evidence against local migration.[58] In particular, INTV rules out increased broadcast coverage by superstations, stations in markets with no regional cable network in 1993, stations in markets where broadcasts increased and cablecasts decreased, and stations in markets with limited cable carriage. INTV also examines six markets "where there has been a significant increase in cable exposure," and finds that broadcast coverage has dropped in each. It suggests that this supports the proposition that local baseball coverage is migrating from broadcast to cable. The increases in cable coverage for five of the six markets range from five to 64 games, while the declines in broadcast coverage range from two to 66 games.[59] After some additional analysis, INTV concludes that "the presence of a cable sports channel has been associated with a decline in games in 20 out of the 28 baseball markets."[60]

42. ARC criticizes INTV's discussion and suggests that the Commission should not ignore increases in local broadcast coverage of MLB games because of limited cable coverage or because the stations in question are superstations. ARC believes that INTV's selective statistical analysis provides no evidence of migration at the local level. Moreover, ARC

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[57] MLB Comments at ii, 5, 17-18, Exhibit 1.

[58] INTV Comments at 13-15, Exhibit A; Ex Parte Letter from Robert Alan Garrett, Counsel for MLB, to Jonathan Levy, Office of Plans and Policy, Federal Communications Commission (May 4, 1993).

[59] INTV Comments at 15-16. One of the six markets, Boston, shows a decrease rather than an increase in cable coverage. The cable coverage changes are measured between 1984 and 1993, while the broadcast changes are measured between 1980 and 1993.

[60] Id. at 18.

criticizes INTV for comparing 1980-93 broadcast figures to 1984-93 cablecast figures.[61] MLB asserts that the INTV analysis "effectively concedes that there is no evidence of migration in the majority of the baseball markets" and also states that "the record in this proceeding is devoid of any evidence that particular broadcasters are being denied access to baseball games which they are 'ready, willing, and able' to televise."[62]

43. MLB states that there are numerous factors which may limit stations' interest in local baseball coverage. MLB notes that a baseball club's opportunities to place telecasts on over-the-air television are limited. Stations affiliated with one of the national broadcast networks generally have less interest in televising baseball because of their commitments to televise network programming. In this regard, the emergence of the Fox network has served to decrease interest in bidding for baseball telecasts. The creation of additional broadcast networks (such as those planned by Time Warner and Paramount) could further decrease the amount of time that broadcasters are willing to devote to baseball.[63] INTV suggests that there is simply no correlation between network affiliation and a reduced number of games appearing on a local station. INTV also believes that there is little evidence to support the theory that affiliation with the Fox network has led to a decline in a station's desire to carry local baseball. In addition, INTV states that MLB's claim that creation of new networks (Time Warner and Paramount) will decrease demand for baseball, is mere speculation.[64]

44. MLB also notes that the impact upon gate receipts is a major factor in any telecasting arrangement. Many clubs believe that telecasting home games on broadcast television reduces gate receipts. Two clubs (the Cubs and Braves, which are commonly owned with their flagship superstations) do televise a number of home games over those stations. However, the remaining 24 U.S. clubs will broadcast an average of only fourteen of their 81 home games in 1994.[65] That number has remained relatively constant since 1980. Because of the importance of gate receipts to clubs' financial health, most will likely continue their practice of broadcasting only a small portion of their home games. INTV asserts that the gate receipt issue will not necessarily contribute to a decline in the number games broadcast in most markets. INTV suggests that, in markets like Baltimore, where games are sold out in advance, restrictions on broadcast of home games are not necessary to protect the live gate. INTV argues that protecting the home gate is not a major factor in the decline of televised games; if protecting the home gate were the key factor, then all of the 81 away games could appear on local television without impacting the local gate. INTV believes that

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[61] ARC Comments at 15-17.

[62] MLB Reply at 9-10.

[63] Id.

[64] INTV Comments at 41-42.

[65] MLB Comments at 13-14.

cable sports channels play an important role in reducing the unique value of a local station's rights fees. INTV adds that there is a discernable trend in which regional cable sports channels are securing all local television rights.[66]

45. In addition to looking at factors that may contribute to local migration, we specifically sought comment on the MSG and WPIX-TV contract for over-the-air carriage of New York Yankees games. MSG states that WPIX has contracted to broadcast fifty games per year through the end of the 1996 season. As part of the contract, MSG and WPIX will share revenues derived from the sale of broadcast rights to over-the-air stations beyond WPIX's coverage area. MSG claims it has made "business concessions" (including sharing its advertising revenue from cablecasting with WPIX-TV) to overcome the fact that five of the six New York commercial television stations were unwilling or unable to broadcast the Yankees games in the agreement.[67] MLB believes that the new contract is responsive to concerns that all Yankees games will be transferred to cable. MLB adds that at the time the Commission adopted its original siphoning rules, the Yankees were broadcasting approximately 68 games per year -- down from the 130 games that they had broadcast prior to entering into a contract with HBO for the telecast of several games on a subscription basis.[68]

b. Findings

46. We found in the Interim Report that some instances of migration had occurred at the local level. Commenters have brought to our attention the numerous factors that broadcasters consider in negotiating for MLB games. Considering the evidence, we cannot conclude that the decline in local broadcasts of MLB games that we have observed in a limited number of markets is a result of migration from local broadcasters.

47. We cannot accept INTV's analysis of local MLB broadcasts. As INTV recognizes in its reply comments, the figure of 1705 local games in 1993 that it used includes the two new expansion teams. Without them, the 1993 broadcast total is 1584. This represents an increase of 192 games over 1980. Of the 24 MLB teams in operation in both years, 17 increased their local broadcasts by a total of 349 games. One team stayed the same, and six teams had fewer local broadcasts (a total decline of 157 games) in 1993 than in 1980.

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[66] INTV Reply at 44-45; INTV Comments at 19-20. INTV believes the most notable example of this involves the New York Yankees, where the MSG network owns all the television rights. INTV claims that local stations will no longer be in position to control whether games appear on off-air television. That right will belong to regional sports networks which compete with local stations.

[67] MSG Comments at 2-3.

[68] MLB Comments at 7-8.

Of the 157 game decline, 116 games are accounted for by the White Sox[69] and the Yankees.[70] If we were to take ARC's advice and focus on the 1984-93 period, the overall pattern is the same. During that period, fifteen teams increased their local broadcasts by a total of 256 games, seven experienced declines totalling 98 games, and two teams had no change in the number of local broadcasts. Moreover, we agree with ARC that it is not appropriate to ignore increases in broadcasts in the categories that INTV ruled out. Indeed, one of them -- increased broadcast coverage and reduced cable coverage -- could be consistent with "reverse migration." Although we are concerned with indications of migration at the local level, we see no evidence to indicate that our findings in the Interim Report should be modified. Accordingly, we reaffirm our conclusion that there is no pattern of migration of MLB games at the local level.

D. Professional Hockey

1. Background

48. As stated in the Interim Report, the NHL licenses all national telecasts of its games, while individual teams license local telecasts. In the Interim Report, we found that, with few exceptions, there was no national broadcast television carriage of NHL games after 1980. We concluded that hockey had not migrated from broadcast to cable on a national level because it had not been carried on national broadcast television in the first place. With respect to local carriage of the NHL, the Interim Report noted a slight decline in the number of local games broadcast between the 1981-82 and 1992-93 seasons, but could not identify a single cause for the decline, indicating that NHL local broadcasts could have declined due to

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[69] The number of White Sox games broadcast locally was 114 in 1980 and 48 in 1993, a decline of 66 games. See MLB Ex Parte Letter, supra note 58. However, the big drop apparently occurred between 1980 and 1981. In 1981, the White Sox changed flagship stations from WSNS, channel 44, to WGN, channel 9, and WGN carried "more than 60" White Sox games, down from 114. See also Baseball!: Rights Go Out of the Park, Broadcasting, March 10, 1980, at 36; Baseball, Broadcasting, March 2, 1981 at 46. From 1982 to 1989, WFLD, channel 32, was the White Sox flagship station. Beginning in 1990, the White Sox returned to WGN, which was also the flagship station of the Chicago Cubs. See MLB Comments at 10-11; Baseball, Broadcasting, March 1, 1982, at 50.

[70] After examining the New York market in detail, we found no evidence that the number of Yankees games broadcast locally over the air would be appreciably different absent MSG's contract. New York has six commercial television stations, four of which are national network affiliates (WABC, WNBC, and WCBS and WNYW). The two independent stations, WPIX and WWOR, are likely to negotiate for local over-the-air coverage of Yankees games. However, WWOR currently has a contract to carry 72 New York Mets games. Therefore, WPIX appears to be the best positioned station to negotiate for local over-the-air coverage of Yankees games.

the increase in cable availability or to weakening demand. Nevertheless, we determined that this slight decline was no cause for concern.[71]

49. The Further Notice requested information on the NHL's divisional realignments. We also invited additional comments regarding the telecast of professional hockey generally. We expressed particular interest in pay-per-view exhibition of play-off games by the Chicago Blackhawks and the (former) Minnesota North Stars, and the decline in the number of New York Ranger games on broadcast television. We also explicitly requested information on reverse migration and asked whether any decision had been made regarding additional national broadcast television coverage of NHL games for the current season.

2. Comments

50. The NHL states that, since filing its comments in response to the initial Notice, two new teams have been added to the League -- the Florida Panthers, based in Miami, Florida, and the Mighty Ducks of Anaheim, based in Anaheim, California. In addition, the Minnesota North Stars have relocated to Dallas, Texas, and are now known as the Dallas Stars. The NHL has also realigned the league to promote a conference-based play-off format. The Prince of Wales and Campbell Conferences have been respectively renamed the Eastern and Western Conferences. Each conference includes two divisions: the Atlantic and the Northeast Divisions in the Eastern Conference; and the Central and Pacific Divisions in the Western Conference. Sixteen teams will now qualify for the play-offs (eight teams from each Conference) and will be ranked on the basis of their regular season records.[72]

51. ESPN is in the second year of a five-year agreement with the NHL, pursuant to which ESPN has the exclusive national rights to NHL games. Under this contract, ESPN carries one regular season game each week, and ESPN2 carries three games per week.[73] ESPN also provides almost complete coverage of all play-off games. Although ESPN has exclusive rights to each of the NHL games on a national basis, it is required to black out the home market of the participating teams in each game, in order to protect local coverage of local teams. Last year, ESPN purchased time on ABC for five Stanley Cup play-off games. This year, ESPN will distribute three regular season and three Stanley Cup play-off games to be broadcast nationally by ABC. ESPN plans to continue to work with the NHL to gain national broadcast exposure for games which would otherwise only appear locally or on ESPN and ESPN2.[74]

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[71] Interim Report, 8 FCC Rcd 4884-85; see also NHL 1993 Reply at Appendix A.

[72] NHL Comments at 2.

[73] ESPN2 is a separate sports channel, usually carried on the basic or cable programming service tier.

[74] ESPN Comments at 4.

52. The NHL has expanded its national broadcast package for the current season. The NHL All Star Game was televised on NBC, and a total of over twenty games will be broadcast by ABC to various regions of the country over a six-week period. According to the NHL, this year's ABC package represents a significant increase over last year's five-week package. The NHL also has expanded its relationship with ESPN by adding an additional 75 regular season games on ESPN2 to the 25 games already on ESPN.[75]

53. The NHL states that the number of local over-the-air telecasts of regular season games has increased recently, even allowing for the effect of the expansion teams. In the 1993-94 season, 53 home games and 263 away games are scheduled for broadcast. Excluding the expansion teams, the numbers are 41 home games and 245 away games, which represents a 2.5 percent increase over last year.[76] As noted in the Interim Report, there has been a decline in the total number of local broadcasts since the 1981-82 season.[77] NHL submissions show that, if all expansion teams are excluded, the total number of local broadcasts dropped from 324 in 1981-82 to 242 in 1993-94, but much of the decline is concentrated in a few markets.[78]

54. The Chicago Blackhawks' home play-off games are shown on HawkVision, a pay-per-view service controlled by Rainbow. Rainbow assumed control over the television rights to the Blackhawk games in 1984. As far as Rainbow knows, no Blackhawk games have been locally broadcast since at least 1980. Rainbow asserts that no migration of Blackhawk games has occurred because the team has not permitted local broadcast of its home games in recent history. According to Rainbow, HawkVision televises games that would otherwise be unavailable to viewers, and pay-per-view exhibition of Blackhawk games thus represents an increase in viewing opportunities for Chicago-area hockey fans.[79]

55. MSG, the owner of the Rangers, states that the decline in the number of Rangers games that occurred at the end of the 1989-90 season was not the result of migration.

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[75] NHL Comments at 3.

[76] Id.

[77] Interim Report, 8 FCC Rcd at 4900, Appendix C, Chart 10.

[78] See NHL Comments at Exhibit C; NHL 1993 Reply at Appendix A; NHL 1993 Comments at Appendix 2. Five teams experienced an increase totalling 54 games, while eight experienced a decrease totalling 136 games. One team experienced no change. Three markets -- New York (not including the New Jersey Devils, who moved from Colorado after the 1981-82 season), Boston and Hartford -- accounted for 103 of the 136 game decrease. The NHL notes that the Hartford flagship "went bankrupt and off-air." NHL 1993 Reply at Appendix A.

[79] Rainbow Comments at 4-5.

MSG claims that it was unable to find a broadcast television station willing to continue the schedule of games aired.[80]

56. In response to our inquiry about why there has been a greater increase in cable exhibition of sporting events since 1980 than there has been in broadcast exhibition, the NHL claims that there is more room for growth on cable than on broadcast television and that cable is able to respond to a much more specialized audience than broadcast television stations. The NHL believes that without cable television it would be without national television distribution and asserts that the findings of the Interim Report (that hockey has not migrated to cable on a national level) should be modified to reflect that hockey had to consider cable options to survive. The NHL also states that its use of pay-per-view is extremely limited and entirely local. According to the NHL, pay-per-view has expanded viewer choice by making additional games available and should therefore be considered pro-consumer.[81]

57. The NHL claims that INTV is the only party suggesting that regulation is either necessary or legally permissible. INTV does not, however, recommend regulation based on any data relating to NHL telecasts. According to the NHL, INTV focuses on college football, and extrapolates from alleged problems there to suggest a comprehensive regulatory scheme. According to the NHL, INTV's proposal is regulatory overkill and would effect sweeping changes in the way all sports programmers do business. The NHL adds that, even if there were no non-broadcast options, it does not necessarily follow that programming would "migrate" back to broadcast television. Instead, the NHL asserts, the absence of those options would result in a sharp reduction in, and a nearly complete loss of any national exposure for, some sports programming.[82]

3. Findings

58. The comments submitted do not provide any additional evidence of migration of professional hockey games from broadcast television either on a national or local level. Before its exhibition on cable, professional hockey had virtually no national television exposure. Additionally, the NHL has demonstrated a recent increase in the number of hockey games broadcast locally. We therefore do not find any migration problem in professional hockey.

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[80] MSG Comment at 3-4.

[81] NHL Comments at 2, 5.

[82] NHL Reply at 2.

E. College Football and Basketball

1. Background

59. The Notice requested data regarding the video distribution of college football and basketball games since 1980. In general, most collegiate commenters asserted that cable television coverage of collegiate athletics has not led to a decrease in broadcast coverage. Instead, they argued that cable has expanded the number and variety of collegiate events available to the public and, in many cases, events have been cablecast that would not otherwise have been shown on broadcast television.[83] We found in the Interim Report that there was no evidence of migration of college basketball games to subscription media. We also found that concerns with respect to preclusive contracts arose almost exclusively in the college football context. Therefore, while our Further Notice sought additional information on possible examples of migration or preclusive contracts in the college basketball context, we placed a higher priority on information regarding local telecasts of college football games.[84]

2. College Football

a. Comments

60. INTV submits that there is evidence to demonstrate that college football games are migrating to cable, but several commenters contest this assertion. In its comments, INTV provides aggregate figures on college football telecasts for 1988-92. INTV provides 1984-92 data for three markets in its comments, and 1984-93 data for nine markets in its reply comments.

61. INTV's 1988-92 broadcast figures are for nationally-distributed games, i.e., games exhibited by the three major broadcast networks and those distributed by two syndicators to a group of stations assembled on an ad hoc basis. The figures cited by INTV show that, between 1988 and 1992, the number of college football games on CBS and NBC dropped from fourteen to seven, although games on ABC increased from sixteen to sixty. In the "non-network sector," INTV points out that the number of games distributed by the two broadcast syndicators cited in its data source declined from 64 in 1988 to 42 in 1992.[85] ARC and ESPN point out that, if the three networks and the syndicators are aggregated, the number

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[83] Interim Report, 8 FCC Rcd at 4885.

[84] Further Notice, 9 FCC Rcd at 1652-53.

[85] INTV Comments at 27. The precise area over which the syndicated games were distributed is not specified. Syndicators generally strive to put together an ad hoc group of stations to carry their product in as broad an area as possible.

of network plus non-network games distributed actually rose from 94 in 1988 to 109 in 1992.[86]

62. Cable coverage of college football games drastically increased from 1988 to 1992, according to INTV: coverage on national cable networks has increased from 50 to 192 games;[87] coverage on regional pay sports channels increased from 105 to 280 games; and regional advertiser supported cable sports networks' coverage rose just over threefold, from 676 to 2,265 games.[88]

63. INTV presents an analysis of three television markets -- San Francisco, Tucson and Minneapolis -- based on a survey of Saturday sports newspaper listings in each of these areas from 1984 through 1992. In San Francisco, INTV found that, from 1984 to 1992, the total number of games broadcast declined from 141 to 72 and the number of cable games increased from 28 to 86.[89] INTV also asserts that the number of non-network games involving local teams dropped from four games to none, while cable coverage of local schools' games rose from one to seven games over this period.[90]

64. In Tucson, INTV reports that, from 1984 to 1992, the number of live broadcasts dropped from 45 to 24, and the number of live cablecasts increased from 29 to 61.[91] INTV also examined coverage of University of Arizona and Arizona State games in Tucson.[92] The data indicated that broadcast coverage decreased from 12 to three games. On cable, however, there were zero games in 1984 and zero in 1992 (although in 1991 cable

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[86] ARC Reply at 20; ESPN Reply at 4.

[87] The growth is accounted for by the entry of two new cable sports networks -- Prime Network and SportsChannel -- which exhibited no games in 1988, but did show 99 and 48 games, respectively, in 1992. ESPN televised forty games in both 1988 and 1992. INTV Comments at 27-28.

[88] Id.

[89] Id. at 29-32. INTV counts each telecast of a game in the San Francisco ADI. Thus, if the same game were exhibited on all three ABC affiliates in the ADI, it would be counted as three games.

[90] Id.

[91] INTV Comments at 32-35. In 1992, there were an additional seven tape-delay broadcasts and an additional seven tape-delay cablecasts.

[92] The University of Arizona is located in Tucson, while Arizona State is located near Phoenix.

covered four games).[93]

65. INTV also examines college football coverage in the Minneapolis market.[94] Broadcast coverage declined from 13 to ten games, while cable coverage increased from 11 to 26 games between 1984 and 1992. INTV also notes that there has been no live local coverage of University of Minnesota games since 1988.[95] Without specifically analyzing INTV's data, ARC and ESPN suggest that it is impossible to draw any conclusions about the overall college football market based on only three selected cities.[96]

66. In its reply comments, INTV submitted data covering nine markets during the 1984-93 period and an analysis that it claims shows migration of college football games from broadcast television to cable.[97] The analysis is based on data compiled by Pappas Telecasting Companies ("Pappas"). These data were gathered from the Saturday sports listings from major newspapers in the following nine television markets: (1) Cedar Rapids-Waterloo-Dubuque, Iowa; (2) Chicago, Illinois; (3) Detroit, Michigan; (4) Eugene, Oregon; (5) Columbus, Ohio; (6) Harrisburg-York-Lancaster, Pennsylvania; (7) Lansing, Michigan; (8) San Francisco-Oakland-San Jose, California; and (9) Los Angeles, California. INTV states that the results of this study provide additional support for its claim that live over-the-air coverage of college football games has declined significantly, particularly with respect to games covered by local television stations.[98]

67. The INTV figures are broken into three categories -- network, local, and cable. Both "network" and "local" refer to broadcasts on local television stations in the nine markets, but the "local" category is comprised of games not distributed by a broadcast network. Local games may be exhibited on network affiliates or independent stations. As the following chart indicates,[99] INTV's nine-market data set shows that, between 1984 and 1993, network broadcasts increased from 246 to 275, local (or non-network) broadcasts declined from 162 to

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[93] INTV Comments at 34.

[94] Id. at 35-36. The Minneapolis figures are based on November data, while the San Francisco and Tucson figures are based on September-December data.

[95] INTV notes that there were three live Minnesota games exhibited locally in 1985, two each in 1986 and 1987, and one in 1988.

[96] ARC Reply at 20; ESPN Reply at 3-4.

[97] INTV Reply at 1-31, Appendix.

[98] INTV Reply at 22.

[99] See INTV Reply at 23.

42, and cablecasts increased from 433 to 616.[100] Thus, the number of games broadcast in these nine markets dropped from 408 in 1984 to 317 in 1993, while total telecasts rose from 841 to 933.

	Network Broadcasts	Non-network Broadcasts	Total Broadcasts	Cablecasts	Total Broadcast plus Cable
1984	246	162	408	433	841
1993	275	42	317	616	933

68. INTV asserts that there is a direct correlation between exclusive contracts and the decline of games on network and local stations. INTV relates the 1986-87 drop in total broadcasts (from 506 to 376) to ABC's acquisition of the national broadcast rights to Pacific-10 Conference ("Pac 10") and Big 10 Conference ("Big 10") games. INTV also notes that ESPN has had cable rights to the College Football Association ("CFA") games every year since 1984. The number of non-network games broadcast dropped from 115 in 1988 to 83 in 1989. INTV notes that, beginning in 1989, ESPN had a contract to cablecast Big 10 games and ESPN/Prime Ticket had a contract to cablecast the Pac 10 games. INTV also suggests that other cable sports channels began to affect the market in 1989, when, according to Paul Kagan, basic tier advertiser-supported cable sports channels almost doubled their coverage from 676 games in 1988 to 1,299 games in 1989. Finally, INTV states that the decline in non-network games from 72 in 1990 to 55 in 1991 directly coincides with ABC's 1991 acquisition of the rights to the CFA games.[101]

69. A variety of college athletic conferences submitted comments claiming that coverage of their member schools on both broadcast and cable television has been increasing. The Pac 10 submits that regular season appearances by its member schools have increased substantially on both broadcast and cable networks: from seventeen broadcast and three cable appearances in 1983 to 29 broadcast and 23 cable network appearances in 1993 (not including local arrangements).[102] In addition, several parties assert that the break-up of the CFA in 1996, and the corresponding new agreements which will be negotiated will result in increased

[100] Network broadcasts peaked at 289 in 1989, local broadcasts peaked at 237 in 1985 and declined steadily thereafter, while cablecasts peaked at 682 in 1991, declining to 616 in 1993. See INTV Reply at 23.

[101] INTV Reply at 23-25.

[102] Pac 10 Comments at 2.

broadcast coverage of college football games.[103]

70. The ACC claims that coverage of its games on broadcast stations is also on the rise.[104] The ACC states that under its current CFA contract approximately four to six games will be shown nationally or regionally on broadcast stations and approximately 18-22 games will be available on broadcast when combining regional syndication with the national plan. Starting in 1996, agreements with ABC, ESPN and Jefferson Pilot Sports ("JP") (ACC rights holder for regional syndication) will increase by more than 50 percent the number of ACC games available on over-the-air TV: as many as forty games annually could be televised live by these three entities. ACC also notes that under its agreement with JP, local independent stations are free to acquire rights to broadcast ACC games held by JP, which some independent stations have in fact done.

71. Similarly, the Big East indicates that broadcast coverage of Big East college football games has not diminished or migrated to cable.[105] Through membership in the CFA, Big East teams are guaranteed to receive at least twelve percent of the total network appearances available pursuant to the CFA agreements with ABC and ESPN, which expire in 1995. Big East teams have appeared in six to seven ABC broadcasts each year since the Big East was formed in 1991. Big East teams also occasionally appeared on network telecasts of certain "crossover" games[106] against non-CFA members and cleared a "Game-of-the-Week" in most television markets in the Northeast and south Florida during this period. The Big East historically has given priority to its Game-of-the-Week in order to maximize its exposure in major television markets. New agreements will substantially expand the Big East's broadcast coverage. Beginning in 1996 when the Big East leaves the CFA and the conference's recently negotiated contracts take effect, the Big East exposure will increase, with nine to 12 conference games appearing on CBS each season.

72. ARC notes that in 1996, three major broadcast networks ABC, CBS, and NBC will be broadcasting college football in the same season, and it also raises the possibility that Fox might participate. For example, ARC states that new Big Eight contracts negotiated since the Interim Report provide for more games on both broadcast and cable than ever before. For the 1996-2000 seasons, ARC will have the right to televise up to twenty Big

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[103] Beginning in 1996, the CFA will be replaced by smaller conferences of schools such as the Big East Football Conference ("Big East") and the Atlantic Coast Conference ("ACC").

[104] For a description of ACC's current and future contractual arrangements, see ACC Reply at 2-5.

[105] For a description of Big East's current and future contracts, see Big East Comments at 2-5.

[106] A "crossover" game is one in which the opposing teams are members of different conferences or associations.

Eight games in addition to ABC's right to broadcast up to 36 games. ABC will have priority, but ARC can submit a list of ten games to the Conference each year, from which at least one will not be subject to ABC preemption. ARC will have the rights to two Thursday night prime time games and ten early window Saturday games. ABC has the rights to the late window games every Saturday and to two early window selections for double-headers on two Saturdays. ARC states that it plans to televise the Thursday and Saturday night games only on Prime Network, to syndicate the Saturday "early window" games to local broadcast stations throughout the Big Eight television markets, and to supplement the "inner market" broadcast coverage with cable distribution in non-Big Eight television markets.[107]

b. Findings

73. The information submitted in response to the Further Notice raises the concern that there has been some movement of college football games from broadcast television to cable. While the data are inconclusive, and the magnitude of the effect is unclear, the evidence does indicate a decrease in the availability of games involving local teams for broadcast in some local markets. However, recent developments also suggest that, after the CFA contract expires in 1996, the number of games on broadcast television overall is likely to rise. Because the data suggesting migration of college football games come from INTV, we shall focus our discussion on its submissions.

74. Because the three-market sample in INTV's comments is so limited, we concentrate on the nine-market data in INTV's reply comments.[108] While nine markets is

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[107] ARC Comments at 1-3, 13-15.

[108] With respect to the three market sample, the overall decline in broadcast coverage and increase in cable coverage in the San Francisco market appear substantial, but the figures on broadcasts of local teams' games cover only non-network broadcasts. The San Francisco data table (INTV Comments at 32) does not provide information on network carriage of local teams. The data underlying the coverage table were filed separately by INTV. They show that, in 1992, the most recent year available, five games involving local teams were carried by a broadcast network. The coverage table shows zero non-network games that year. For 1984, the underlying data appear to show that a broadcast network carried three local team games. The four 1984 non-network telecasts cited in INTV's Comments are of three different games. Hence, the INTV data suggest a moderate decline in broadcast coverage of local teams' games (from six or seven to five). As noted above, the Pac 10 states that broadcast coverage of its teams increased during the period in question. In the Tucson case, broadcast coverage has declined, but cable coverage has been minimal throughout the period, raising a question of whether the drop in broadcast coverage is a consequence of migration or something else. INTV's treatment of local television coverage of Arizona and Arizona State games also leaves unanswered questions. Arizona State is in the Phoenix television market, not the Tucson market. Hence, it would have been useful to know what sort of coverage

certainly better than three, it is nevertheless a relatively small sample. Moreover, the sample is presented as being representative of only the Big 10 and the Pac 10 experience. It is thus designed not to include any home markets of CFA teams.[109]

75. As described above, INTV's aggregate data show that broadcast network coverage and cable coverage increased, while non-network broadcast coverage declined over the 1984-93 period. Network coverage increased from 246 to 275 games, with peaks at 281 in 1986 and 289 in 1989. Cable coverage increased from 433 in 1984 to 616 in 1993, with a small intermediate decline in 1986 and a more substantial decline in 1992. Non-network broadcast coverage rose sharply in 1985 to 237 games from 162 in 1984, but by 1993 it had declined to 42 games. Hence, overall broadcast coverage in the INTV sample declined from 408 to 317 games between 1984 and 1993.

76. The aggregate pattern of increased broadcast network and cable coverage accompanied by decreased non-network broadcast coverage occurs in only five of the nine individual markets. In two cases, Eugene and Harrisburg, non-network coverage, network coverage, and cable coverage all increased. Cedar Rapids exhibited a decline in coverage in all three categories, while Columbus had an increase in network coverage, but both local and cable coverage declined between 1984 and 1993.[110]

77. INTV presents a regression analysis of these data that it claims demonstrates that college football games have migrated from non-network broadcast television to cable. The INTV equation is estimated using ten observations (one for each year from 1984-93). The dependent variable is the logarithm of the number of non-network games telecast and the independent variables are the number of games cablecast, a time trend variable (taking on the value of one in 1984, two in 1985, etc., up to ten in 1993), and three "dummy variables." The dummy variables take on a value of one in certain assigned years and zero otherwise.[111]

Arizona State received in its home market of Phoenix. The data underlying INTV's Tucson coverage table (INTV Comments at 34) were filed separately and show that most of the coverage has been of Arizona games. In the case of Minneapolis, while broadcast coverage declined and cable coverage increased, the decline in broadcast coverage was small, even taking into consideration that only one month of the season was examined.

[109] The Harrisburg, Pennsylvania market is included even though Penn State, which has agreed to join the Big 10, was not actually a member of that conference during the 1984-93 period.

[110] In the case of Columbus, cable coverage had risen during some intermediate years.

[111] In this case, "q2" takes on a value of one in 1984, 1987, 1990, and 1993 and zero otherwise; "L2" takes on a value of one in 1985 and 1990 and zero otherwise; and "M1" takes on a value of one in 1986 and 1990 and zero otherwise. The equation is described in INTV Reply, Appendix at 13, 15-19.

The equation fits the ten-observation set of data very well and the coefficients of the variables are all statistically significant.[112] However, INTV provides no overall explanation (or "model") of the mechanism of sports migration and in particular fails to explain what the dummy variables signify and why they were included in the equation. These factors make it difficult to evaluate the regression and impossible to conclude that it establishes a causal link between cablecasts and non-network broadcasts.

78. INTV bases its conclusion regarding migration on its determination that the coefficient of the cable variable is negative and statistically significant. However, INTV apparently did not test for the effect of broadcast network coverage on non-network coverage. INTV's own citation of aggregate data for 1988-92[113] suggests that part of the evolution of broadcast coverage is from syndication to network coverage.[114] Inclusion of a network variable in the equation could affect the magnitude and statistical significance of the cable coefficient.[115] Moreover, there is a statistically significant correlation between the time trend and games cablecast variables. This condition, known as "multicollinearity," can also affect the reliability of coefficient estimates.[116] Additionally, there may be some difficulties with the way certain variables are defined. First, the non-network coverage variable appears to be a mixture of live and tape-delay games (some noted as such in INTV's background table and some not). It is likely that the determinants of live and tape-delay games are different. Second, the cable data for 1992 and 1993 include substantial numbers of pay-per-view games

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[112] The adjusted R-Square statistic is 0.976, and the coefficients are all significant at the nine percent level or better, using a two-tailed t test. For a discussion of these statistics and of regression analysis, see G. S. Maddala, Econometrics, 104-28 (1977) ("Maddala").

[113] INTV Comments at 27.

[114] The figures described at ¶ 61 above are for network games and games supplied by syndicators. We recognize that some network coverage is regionalized and that syndicated games also generally do not have full national distribution. Hence, no individual market is likely to receive all of these games.

[115] In the reported equation, the coefficient on the cable variable is 0.00258, which implies that, if other factors are held constant, an increase of one in the number of games cablecast is associated with a decrease of 0.258 percent in the number of non-network broadcasts. For 1985, the peak year of non-network coverage, this is equivalent to 0.6 games; for 1993, the year of lowest non-network coverage, this is equivalent to 0.11 games.

[116] The correlation coefficient for the two variables is 0.863. See Ex Parte Memorandum from Tolis Sigouras, Pappas Telecasting Companies, to Jonathan Levy, Office of Plans and Policy, Federal Communications Commission (June 1, 1994). This correlation is statistically significant at the one percent level. See J. E. Freund and F. J. Williams, Elementary Business Statistics (1964), 312-318, Table VI. For a discussion of multicollinearity, see Maddala at 183-94.

that appear to be out-of-market exhibitions of games licensed for broadcast by ABC and actually broadcast in other parts of the country than the nine markets in INTV's sample. It is not clear that these games should be treated identically to exhibitions of games licensed to cable networks.

79. It is also important to note that the time trend variable in INTV's equation has a negative and statistically significant coefficient. This coefficient implies that, in INTV's formulation, non-network broadcasts of college football games would have declined at a rate of eleven percent per year even if there were zero cablecasts and all other factors were held constant.[117] For the reasons discussed above, we cannot accept INTV's equation as establishing that college football games have migrated from non-network television to cable.

80. Although INTV's regression analysis is inadequate for the reasons stated above, the downward trend in non-network telecasts that INTV documents demands further analysis. Moreover, we are also charged with assessing the causes of any sports programming migration. As noted above, INTV's own comments suggest the possibility of a shift in broadcast distribution patterns from national syndication to network delivery. However, INTV submits that preclusive contracts between college athletic conferences and video programming vendors are the cause of college football migration. Preclusive contracts, i.e., those that prohibit live or delayed broadcast by a local television station of local colleges' sporting events not shown locally on cable, are analyzed in detail below.[118]

81. Non-network telecasts of college football teams peaked in 1985 at 237 for the INTV sample. Our examination of those games shows that only 56 of them involve local teams.[119] In 1993, the year of fewest non-network telecasts (42), 15 involved local

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[117] This runs counter to INTV's proposal, discussed in infra Section VI, that the Commission should presume that, in the absence of subscription media, broadcast television coverage of each sport should increase from year to year.

[118] For the statutory definition of preclusive contracts, see infra ¶ 93.

[119] The following telecasts were classified as "local": for Cedar Rapids, any games involving an Iowa team; for Chicago, any games involving Illinois or Indiana teams (Illinois, Indiana, Purdue, Notre Dame, Northwestern); for Detroit, any games involving teams from Michigan; for Eugene, any games involving Oregon teams; for Columbus, any games involving Ohio teams (all were Ohio State), for Harrisburg, any games involving Pennsylvania teams (only University of Pennsylvania and Pitt were represented); for Lansing, any games involving Michigan teams (Michigan, Michigan State and Western Michigan were represented); for San Francisco, games involving California, Stanford, Cal State Sacramento, San Jose State, U.C. Davis); and for Los Angeles, games involving USC or UCLA (no other California teams appeared).

teams.[120] While local telecasts of local games clearly dropped, the magnitude of the drop is smaller than the aggregate figures suggest. Most of the decline in non-network college football broadcasts is accounted for by out-of-market games. Without tracking the actual complement of games telecast in each year, we are unable to determine with certainty how much, if any, of the change represents movement from national syndication to network and how much, if any, represents migration to cable.

82. To support its assertion that preclusive contracts have hampered non-network coverage, INTV presents figures on non-network telecasts of games involving Big 10 and Pac 10 teams. The figures show a drop between 1984 and 1993 from 16 to three in telecasts of games involving Pac 10 teams and from 33 to seven in games involving Big 10 teams.[121] However, seven of the 16 Pac 10 games are Pac 10 home games with starting times after 3:10 p.m. Pacific Time, ten of the 33 Big 10 games in 1984 began after 6:15 p.m. ET, and several more of the Pac 10 and Big 10 games began prior to 12:30 p.m. ET. Thus, while time period restrictions such as those discussed below in the section on preclusive contracts conceivably would not have barred many of the 1984 non-network broadcasts,[122] we are unable to conclude that the decline in non-network telecasts of games of these two conferences was not in part attributable to the time period exclusivity clauses in national broadcast or cable football contracts.

83. The record indicates that there is an abundance of college football available to the public on both broadcast and cable television. Broadcast network and cable coverage have both increased in recent years, and the impending break-up of the CFA suggests that broadcast coverage will increase further.[123] There is, however, some evidence that non-network coverage of college football has declined since 1984, and that decline has not been fully offset by the increase in network coverage. While we cannot conclude that the decline reflected in INTV's nine-market sample represents a significant migration trend or that the

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[120] In the Detroit market in 1993, telecasts involved Northern Michigan and Wayne State, which were not represented in 1985.

[121] Note that this is different from non-network telecasts in general. These INTV data address telecasts of games involving the teams in the Big 10 and the Pac 10.

[122] See infra ¶ 97.

[123] We note that several commenters specifically assert that consumers, conferences, and universities may benefit from sports programming diversity available through cable carriage, especially in situations where television broadcast options were not previously available. See Big East Comments at 3-4; Southland Comments at 1-3; Colorado State University 1993 Comments at 1-3; University of Pittsburgh 1993 Comments at 1-2. Some commenters make the same point with respect to sports other than football. See, e.g., Denver Comments at 1-3; Sun Belt Comments at 1; Colonial Athletic Association 1993 Comments at 1-3; Colorado Athletic Conference 1993 Comments at 1-3.

nine-market sample is representative of the nation as a whole, we also cannot conclude that such decline is not attributable in part to the provisions in such contracts that impose conditions on the local broadcast of games involving local teams. For this reason, we shall continue to monitor developments in this area and, if warranted, take appropriate regulatory action.[124]

3. College Basketball

a. Comments

84. According to the National Collegiate Athletic Association ("NCAA"), every one of the 63 tournament games in the Final Four Tournament in Division I mens basketball was carried, in whole or in part, by broadcast television. In fact, the NCAA indicates that there has actually been reverse migration because many of the first round Final Four Tournament games were previously telecast only on cable (ESPN).[125]

85. With respect to lesser known basketball conferences, Sun Belt Conference ("Sun Belt") and Southland Conference ("Southland") both state that they have been unable to obtain broadcast station and/or network coverage of their sports events, primarily men's and women's basketball, and thus have contracted with regional and national cable sports networks. Cable coverage is therefore extremely important to these conferences; it enables them to obtain television exposure outside of their local markets, thus enhancing both the member schools' recruiting potential and viewing opportunities for students, alumni and fans.[126]

b. Findings

86. The information submitted in response to the Further Notice indicates that our initial conclusion that college basketball games have not migrated to subscription media remains correct. In fact, we find that there is evidence of some reverse migration of games from cable to broadcast television. Thus, today there are more college basketball games available on broadcast television than on cable. Moreover, in the case of lesser known basketball conferences, cable has provided the only television coverage beyond limited local market exposures. We therefore affirm our initial conclusion that there has been no migration of college basketball games to cable and that cable in fact serves an important role in

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[124] Among the matters that we shall monitor are the impact on college football broadcasts of the break-up of the CFA (see Further Notice, 9 FCC Rcd 1653; ABC Comments at 5-6; CBS Reply at 15) and the outcome of pending litigation with respect to the Pac 10 contracts (see Pappas Telecasting Inc. v. Prime Ticket Network, No. CV-F-5589-OWW (E.D.Cal)).

[125] NCAA Comments at 2.

[126] Sun Belt Comments at 1; Southland Comments at 2-3.

covering college basketball games that would otherwise not be televised at all.

F. Other Sports

1. Background

87. The Interim Report stated that cable and collegiate commenters indicated that national and regional cable sports networks provide coverage of a wide variety of previously untelevised professional and amateur sporting events, as well as sporting news, commentary and other informational programs involving specific sports, fitness and outdoor activities. According to the Interim Report, a number of commenters specifically mentioned the decline of professional boxing on broadcast television, noting that boxing has essentially moved to cable and other subscription services. As to the reasons for this trend, ABC agreed that boxing has essentially moved from broadcast to cable and other subscription services, but argued that boxing has a more specialized audience than other sports listed in the Notice and that it does not have as extensive a history on broadcast television. NCTA asserted that boxing was abandoned by broadcasters before the inception of cable networks, and argues that cable has brought regular coverage of boxing back to prime time.[127] The Further Notice requested additional comments on the migration of any sporting events other than those in professional football, basketball, baseball and hockey, and college football and basketball, as well as any other relevant topics not otherwise specifically identified.[128]

2. Comments

88. With respect to the Olympic Games, the National Cable Television Association ("NCTA") points out that NBC has announced that it will not take a cable partner for televising the 1996 Summer Olympic Games. In addition, consistent with the Interim Report, ARC states that cable sports networks, particularly regional sports networks, televise a wide variety of sporting events never previously carried by broadcast television. ARC submits that, unlike broadcast stations which face pressures to clear network-provided programming during most of their broadcast day, regional cable sports networks are devoted entirely to sports and can experiment with coverage of new events. In several cases, such as women's college basketball and professional beach volleyball, sports which were first carried on cable have gained enough popularity to attract broadcasters, resulting in reverse migration. Regional cable networks also serve the public interest objective of local origination of programming, by providing television coverage for the first time to teams from local colleges and high schools, or to other events, such as the Special Olympics.[129]

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[127] Interim Report, 8 FCC Rcd at 4887.

[128] Further Notice, 9 FCC Rcd at 1651.

[129] NCTA Reply at 2; ARC Comments at 16-18.

89. In this connection, since 1989, Home Sports Entertainment ("HSE"), a regional sports cable service, has produced and carried an annual two-hour special covering the Texas Special Olympics ("TSO") Summer Games and has repeated the program four to five times each year, while broadcast television only provides occasional short news stories and documentaries about the Special Olympics. TSO states that it derives substantial benefits from this regional cable coverage, including improved recruitment, enhanced benefits for Special Olympians, increased exposure of TSO events to an entirely new audience, i.e., sports fans, and improved public perception of mental retardation. According to TSO, the public relations and educational value of such exposure is "incalculable."[130]

90. HSE also provides coverage of sporting events of University Interscholastic League ("UIL"), a league comprised of public high school teams in Texas. UIL asserts that broadcast television stations and networks have no interest in carrying UIL events and regional cable networks provide its only television outlet. For instance, HSE provides live coverage of UIL state finals in boys basketball, football and baseball, highlights of state track & field, tennis and golf championships and provides weekly shows highlighting UIL teams. Broadcast television, on the other hand, has only carried one UIL sporting event live. UIL sought bids for live coverage of the state championship games now carried by HSE and no broadcasters expressed an interest, even when UIL offered to make them available for free.[131]

91. The commenters also support the Commission's initial conclusion that there is no migration of other college sports from broadcast to cable. The University of Denver ("Denver") submits that the FCC should not overlook the substantial and tangible benefits resulting from cable coverage of college sports events. Denver hockey games have been televised by regional sports networks in the U.S. and in Canada, thereby generating significant interest in the school on the part of prospective students and student athletes. This wide-spread exposure would be impossible to obtain on broadcast television and cable coverage has also helped fund-raising efforts among Denver alumni. For these reasons, Denver believes that regulations restricting cable coverage would adversely affect Denver and sports fans alike.[132]

3. Findings

92. The record indicates that there is no evidence of migration in other college, professional or amateur sports. In fact, the growth in cable sports programming appears to have benefited lower profile sporting events, such as the Special Olympics, by providing television exposure to sports that would otherwise be unable to obtain it. We also find no evidence in the record to indicate that anything other than pure market forces is responsible

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[130] TSO Comments at 1-4.

[131] UIL Comments at 1-2.

[132] Denver Comments at 2-3.

for the lack of broadcast coverage of these events. We agree with ARC that the nature of regional cable networks allows them to be more flexible than broadcast stations in choosing material for carriage. Thus, the growth of cable sports programming in this area appears to indicate an increase in viewer choice rather than migration from free over-the-air television to cable, and should therefore be considered to be in the public interest.

III. PRECLUSIVE CONTRACTS

A. Background

93. The 1992 Cable Act directs the Commission to "analyze the extent to which preclusive contracts between college athletic conferences and video programming vendors have artificially and unfairly restricted the supply of the sporting events of local colleges for broadcast on local television stations" and, in consultation with the Attorney General, to "determine whether and to what extent such preclusive contracts are prohibited by existing statutes."[133] The Act defines a "preclusive contract" as a contract which prohibits a local television station from presenting either a live local college event that is not carried live by any local cable system or a local college event shown on a tape-delayed basis that is not carried, live or tape-delayed, by a local cable system.

94. In the Notice, we asked whether there is a significant connection between preclusive contracts and migration of games to cable, and sought comment on the economic and social consequences of preclusive contracts. Commenters' arguments regarding preclusive contracts focused on college football. In the Interim Report, we found that the precise interplay between the various contracts was difficult to discern from the comments filed. INTV argued that the net effect of preclusive contracts is to prevent individual stations from contracting separately with individual schools to televise games of local or regional interest during the most popular Saturday afternoon viewing periods. Other commenters, such as Capital Cities/ABC, Inc. ("ABC"), the CFA and ESPN, argued that their football contracts are not preclusive because they permit broadcast stations serving the markets of the competing teams to televise games at any time, including during the exclusivity windows.[134]

95. Based on the information available to us in the Interim Report, we did not believe that we could make specific findings regarding the existence, prevalence, or legality of preclusive contracts. Therefore, our Further Notice sought additional comments on how the various contracts operate. In particular, we asked for information on: (1) specific exclusivity provisions in contracts for college football rights; (2) the economic impact of the "home team exception" and short notice provisions; (3) the relevant product and geographic markets for telecasts; (4) efficiencies promoted by such contracts; (5) increases or decreases

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[133] Cable Act of 1992, § 26(c)(1).

[134] Interim Report, 8 FCC Rcd at 4888.

in quantity and/or quality of sports programming; and (6) the role of pay-per-view.[135]

96. In the Interim Report, we indicated that we would analyze preclusive contacts under the antitrust laws, consistent with our statutory mandate to determine whether and to what extent these agreements are prohibited by existing statutes.[136] In the Further Notice we stressed that in undertaking this analysis we would not adjudicate whether specific contracts violate the antitrust laws. We have decided, however, that based on the record in this proceeding and judicial precedent relevant to the contracts of the type at issue here, we will address in this Final Report to Congress whether and the extent to which these preclusive contracts raise competitive concerns.

B. Comments

1. Contractual Provisions

97. Several parties have submitted more detailed comments regarding specific exclusivity provisions in college football contracts. ABC submitted information regarding its contracts with the CFA, the Pac 10/Big 10, the ACC and the Big Eight. ABC's contract with the Pac 10/Big 10 gives ABC the exclusive television rights to all Pac 10/Big 10 home games during the three and a half hour window in which ABC is televising a Pac 10/Big 10 game. Outside of this window, any telecaster (other than CBS, NBC or Fox) may televise any Pac 10/Big 10 games not broadcast by ABC. Even during this window, games may be televised under several circumstances: (1) the game begins on or after 6:15 p.m. ET, or on or before 12:30 p.m. ET, on Saturdays on which the ABC game begins at 3:30 p.m. ET or the game begins on or after 3:10 p.m. when ABC's game begins at 12:30 p.m. ET; (2) any home game of Pac 10 members that begins on or after 3:10 p.m. Pacific Time may be syndicated for live telecast in multiple areas; and (3) home games of Pac 10 and Big 10 members may be televised by closed circuit to the campuses and alumni clubs of participating schools at any time.[137]

98. ABC's contract with the CFA gives ABC limited exclusivity rights to televise the home games of CFA members generally in the late afternoon time period (3:30 p.m.-7:00 p.m.) on Saturdays. Outside of that time period, any third party may televise CFA games, with certain start time restrictions to minimize overlap with the ABC telecast period (games must start before 12:10 p.m., or 12:40 p.m. for SEC games). The contract also allows non-ABC telecasts at any time in the home town of the participating schools, closed circuit and pay-per-view telecasts, and national late afternoon cable telecasts. Also, because the local

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[135] Further Notice, 9 FCC Rcd at 1653.

[136] Interim Report, 8 FCC Rcd at 4889.

[137] There is no general "home market exception" (which would allow local broadcasts in the home towns of the participating schools) in the Pac 10 contract. ABC Comments at 3-6.

time of the kickoff is controlling, west coast games can be televised live in the east in mid-afternoon. The CFA contract expires in 1995 and will not be renewed, due to the break-up of the CFA.[138]

99. In addition, ABC has reached agreements with two former CFA members -- the ACC and the Big Eight -- for the exclusive rights to their home games beginning with the 1996 season. The primary ABC exclusive telecast period is Saturday from 3:30 p.m. to 7:00 p.m.; no other ACC or Big Eight telecasts may be shown during this window, even in the home towns of the participating schools. Outside this period, any non-network third party may show these games with certain start time restrictions for regional cable syndication (Big Eight) and for syndication and cable telecasts (ACC). Also, on a limited number of dates, ABC has rights to telecast games in other time periods. As of the Further Notice's comment deadline, final details on these agreements were being worked out.[139]

100. ESPN states that it continues to cover games under contracts with the CFA, the Big 10 and the Pac 10, as well as having agreements to cover the NCAA Division II and III play-offs with various post-season bowl and all star games. When various conferences and independent schools decided to break off from the CFA after 1995, ESPN entered into agreements with the ACC and the Big East for ten and twelve games, respectively, during the 1996 season, with coverage on ESPN2 contemplated. ESPN is negotiating with other former CFA members as well.[140] ESPN's agreements grant it exclusive rights to games, although games not telecast are available for local broadcast, subject to the exclusivity provisions as to certain time periods: CFA games may be shown from noon to 3:30 p.m.; Pac 10 games any time but 3:30 p.m. to 7:00 p.m.; and Big 10 games after 7:00 p.m.[141] The CFA contract also permits schools to televise locally games not selected by ESPN during its telecast window. ESPN states that the CFA break-up and the impending new contracts that will be negotiated make the scope of coverage after 1995 unclear, although it seems that the volume of games televised will increase. Agreements are already in place for 1996 college football coverage on ABC, NBC, CBS, ESPN, ESPN2 and Prime Network. If history is a guide, according to ESPN, the sale of television rights at a conference level (such as in college basketball) will result in continued wide-spread distribution of college football at the national, regional and local levels.[142]

101. The Pac 10 states that, in addition to its contracts with ABC and Prime Ticket

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[138] Id.

[139] Id. at 5-6.

[140] ESPN Comments at 4-6.

[141] ESPN 1993 Comments at Exhibit C.

[142] ESPN Comments at 4-6.

Network ("PTN"), individual Pac 10 members may negotiate contracts with local stations or cable companies for their local games, provided that the agreements do not conflict with the ABC and PTN contracts. Unlike the ABC and PTN telecasts, most of the local telecasts are on a tape-delayed basis, which Pac 10 schools purportedly prefer because it is less likely to affect live attendance, an important source of revenue.[143]

102. CBS Inc. ("CBS") submits that its agreements (for coverage beginning in 1996) with the Southeastern Conference ("SEC") and the Big East include opportunities for local home team broadcasts. Broadcast rights for all games not selected by CBS (about 120 SEC and 76-79 Big East games per season) will remain with the respective conferences. The SEC may permit unrestricted broadcast of any non-network game within its home market and also may allow non-network games to be carried on pay-per-view within the home states of the playing teams and on closed circuit for alumni viewing. All of these games, including home market broadcasts, may air at any time, even opposite an SEC game broadcast by CBS. Non-network SEC games may be telecast to a regional audience on broadcast or cable if kickoff is before 12:40 p.m. or after 6:10 p.m., or, if the game is tape-delayed, after 11:00 p.m. The Big East contract authorizes broadcasts of home market games not selected by CBS, as long as kickoff is before 12:10 p.m. or after 6:10 p.m. Syndicated telecasts of non-network Saturday games on a regional basis are also allowed if the game begins before 12:10 p.m. or after 6:10 p.m., or tape-delayed after 11:00 p.m. Visiting Big East teams playing against non-Big East teams may appear on television pursuant to agreements negotiated by the home team.[144]

103. With respect to the delivery of college football games via pay-per-view, the University of Arkansas ("Arkansas") submits that it has authorized only two pay-per-view games in the last five years and that it currently does not have a formal pay-per-view program. Arkansas intends to keep the rights to games and to grant pay-per-view rights only on a per-game basis.[145] The University of Miami ("Miami") states that during the 1993 football season it played three games which were televised regionally by ABC and which were also carried in some regions of the country on pay-per-view. Miami did not appear on any pay-per-view transmissions in 1992, and only one pay-per-view transmission in 1991.[146] ABC states that it will continue its pay-per-view plan for the 1994 season. In general, under ABC's pay-per-view plan, the regional game of the greatest local appeal will be broadcast over the air in a particular area. Games are broadcast over the air in areas where they are the

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[143] Pac 10 Comments at 1-3.

[144] CBS Reply at 5-10; Big East Comments at 3-5.

[145] Arkansas Comments at 1.

[146] Miami Comments at 1-2.

most desirable, and offered simultaneously as pay-per-view alternatives in other areas.[147]

104. INTV submits that preclusive contracts effectively prohibit local broadcasts of local games. According to INTV, the only options for local broadcasters are to convince schools to play games either earlier or later, show games on a tape-delayed basis, or attempt to sublicense games from regional sports channels. In addition, because the major networks have contracts with several conferences, even if a window opens under one contract, a local broadcaster may be limited by an additional exclusive window under another contract. INTV also claims that the short notice provisions, which allow games to be selected for broadcast or cablecast on six to twelve days advance notice, make it difficult for local stations to obtain rights to local games. According to INTV, schools are reluctant to contract with local stations because they are not sure whether their games will be selected for national telecast by ABC or ESPN. INTV states that such short time frames also make it difficult for local stations to produce and market games.[148]

105. ABC argues that short notice provisions are important to its ability to create a season-long package that will attract the largest audience by showing the best match-ups as the season progresses.[149] CBS states that short notice provisions are extremely important to networks' realizing their full investment in college sports rights and that these provisions should not be a problem for broadcasters, who are in the business of covering news and events of importance on notice of less than to six to twelve days. CBS asserts that if local broadcasters want to contract with schools for rights to home games, there is nothing to prevent them from negotiating a contract with the school for a certain number of games, with a contingency for games later selected by the primary rights holder.[150]

106. According to some commenters, the decline in local broadcasts is due simply to market forces unrelated to the exclusivity provisions in contracts for rights to games. These parties claim that local broadcasters are not broadcasting games because they do not want to (i.e., because other programming is more profitable), rather than because they are unable to.[151] Conversely, INTV claims that the primary, if not only, reason why there are fewer college football games on local broadcast stations is not that local broadcasters do not want to

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[147] ABC Comments at 6-7. For a brief discussion of the role of pay-per-view in college football, see infra Section VI.D.

[148] INTV Reply at 11-17.

[149] ABC Comments at 14.

[150] CBS Reply at 10-13. Contingency contracts are common in professional sports, where play-off series often involve an indefinite number of games, depending on the individual teams' performances.

[151] ABC Comments at 21; ACC Reply at 3-5.

televise college football games, but that exclusivity provisions in existing contracts have made it virtually impossible for local stations to obtain the rights to broadcast any local games. To support this assertion, INTV points to several examples of local stations which assert that they have been unable to secure the rights to broadcast certain local games due to preclusive contracts with broadcast or cable networks.[152] INTV also argues that it is inconsistent for ABC simultaneously to argue that local broadcasters do not want to televise games, and to require exclusivity provisions which prevent local broadcasters from acquiring the rights and broadcasting competing games.[153]

2. Procompetitive Efficiencies

107. ABC and CBS argue that time period exclusivity provisions in their contracts with college football conferences are procompetitive. ABC states that its contracts (and other college football contracts) are the result of intense competition among telecasters and that contracts are won by effectively outbidding other national, regional or local telecasters. A college football league or association's decision to sell the rights to its games is based, according to ABC, on which telecaster offers the most benefits in terms of rights fees, quality of production, scope of telecast and equitable exposure for each school. ABC and CBS submit that their contracts are structured to increase the size of their viewing audience, thus making these telecasts particularly efficient and valuable vehicles for advertisers.[154] Without these efficiencies, ABC and CBS claim that they would receive less advertising revenue, and thus would not be able to bid as much for college football telecast rights, or to produce high quality telecasts.[155] By increasing the value of telecasts to advertisers, exclusivity provisions enhance broadcasters' ability to compete against cable programmers in bidding for rights to televise college football games, and thereby reduce the likelihood of migration from broadcast to cable.[156]

108. The college athletic conferences filing comments all agree that exclusivity

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[152] The primary examples cited by INTV are: KCPQ, Seattle/Takoma, Washington; KUTP-TV, Phoenix, Arizona; KMSB, Tucson, Arizona; and KMPH-TV, Fresno, California. INTV 1993 Comments at 10-17.

[153] INTV Reply at 19-21.

[154] According to ABC, advertisers prefer larger audiences to small audiences, and they thus pay more per viewer as the size of the audience increases. See ABC Ex Parte Letter, supra note 50, at 3 and Exhibit 2.

[155] See also ESPN 1993 Comments at 10-11.

[156] ABC Comments at 13; ABC 1993 Comments at 12; CBS Reply at 16-17.

provisions are important to sustaining widespread interest in college football.[157] Although the Pac 10 states that it did not affirmatively choose to enter into the exclusivity provisions in its contracts with ABC and PTN, these contracts have increased Pac 10 exposure, which is very important to the conference and to its individual member schools.[158] The ACC submits that time period exclusivity has made the "ACC Game-of-the-Week" package economically viable over a syndicated network of individual broadcast stations, and that time period exclusivity, first selection of member school games and twelve-day notice provisions all maximize opportunities for consumers to see the best games on a given Saturday.[159]

109. INTV, on the other hand, argues that ABC and ESPN's college football contracts are inconsistent with basic competition law principles. INTV states that ABC's argument that exclusivity provisions are procompetitive is unsupported by various court cases, which are discussed in detail below. INTV also relies on a Federal Trade Commission ("FTC") proceeding (also discussed below), and, in particular, Complaint Counsel's Non-Binding Statement[160] for the proposition that time period exclusivity provisions are not procompetitive. INTV submits that although ABC claims that its contracts with the CFA, the Big 10 and the Pac 10 promote economic efficiencies by increasing its viewing audience and enhancing the value of its telecasts, ABC never quantifies these purported efficiencies or relates them to the time period exclusivity and short notice provisions.[161]

3. Market Power

110. ABC argues that it does not have market power in either of the two markets that it believes are relevant to its college football contracts, that is, downstream advertising markets, in which telecasters sell advertising time and upstream television rights markets, in which colleges sell television rights to telecasters. In downstream advertising markets, ABC states that it is difficult to delineate the parameters of the market for antitrust purposes without a detailed factual analysis, but that it believes that the product market in which advertising for college football telecasts is sold includes advertising on all sports programs and on many other kinds of programs, that the product market includes all television media (broadcast, syndicated and regional telecasts and cable) and print media, and that the geographic market is nationwide. Given such a broad market, and the fact that market shares are low, commercial relationships ephemeral and competition intense, it is impossible,

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[157] See, e.g., ACC Reply at 3-5; Pac 10 Comments at 4.

[158] Pac 10 Comments at 4.

[159] ACC Reply at 3-5.

[160] Complaint Counsel's Non-Binding Statement, Federal Trade Commission, Bureau of Competition, Docket No. 9242 (October 26, 1990).

[161] INTV Reply at 8.

according to ABC, for any telecaster to profitably raise prices above competitive levels or otherwise exercise market power in the advertising market.[162]

111. Similarly, in the upstream television rights markets, ABC claims it does not possess monopsony power, due to the intense competition among telecasters for rights to televise college football games and other sports events. ABC states that this competition is evidenced by the recent break-up of the CFA, changes in telecasting rights for the SEC, Big East Football, the NFL, MLB, the Olympics and the general escalation of rights fees. ABC goes on to argue that since no telecaster could exercise market power in the advertising markets even if it were able to buy the bulk of the rights to any one league or association, it is unlikely that any existing league or association of teams has market power on its own. ABC distinguishes the Supreme Court case, National Collegiate Athletic Assn. v. Board of Regents of the University of Oklahoma,[163] on this point by stating that, although in that case the Supreme Court found that the right to televise college football was the relevant market and that the NCAA completely controlled this market, today no one league controls even a majority of the rights to games, and the industry as a whole has changed significantly since 1982.[164]

112. INTV counters that ABC and ESPN, which have contracts with almost every major college conference in the country, do have market power. First, INTV argues that ABC's definition of the relevant product market -- covering all forms of entertainment programming -- is inconsistent with the definition adopted by most courts. INTV asserts that in NCAA and a second case, Regents of University of California v. ABC, Inc.,[165] the court defined the relevant product market as broadcasts of intercollegiate football games. INTV states that in another case (in which it was the plaintiff), Assn. of Independent Television Stations, Inc. v. College Football Assn.,[166] the CFA admitted the relevant product market was the rights to intercollegiate football games. INTV adds that ABC's definition is inconsistent with the 1992 Cable Act, which directs the FCC to examine these contracts as they relate to college football. Thus, INTV argues that Congress has defined the market in terms of college football games available on free, over-the-air television.[167]

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[162] ABC Comments at 17-20.

[163] 468 U.S. 85 (1984) ("NCAA").

[164] Id.

[165] 747 F.2d 511 (9th Cir. 1984) ("Regents").

[166] 637 F. Supp. 1289 (W.D. Ok. 1986) ("INTV").

[167] INTV Reply at 6-7.

C. Findings

113. As required by the statute, our analysis of preclusive contracts is twofold. First, we must determine whether preclusive contracts have artificially and unfairly restricted the supply of local broadcasts of local games. The second step is to determine, in consultation with the Attorney General, "whether and to what extent such preclusive contracts are prohibited by existing statutes."[168] The only relevant laws suggested by the commenters are the federal antitrust laws. Thus, we will examine college football contracts based on an antitrust analysis.

1. Impact of Contracts on Supply of Local Broadcasts

114. As a threshold matter, with respect to tape-delayed games, there is no evidence in the record to suggest that local stations are restricted from broadcasting local college football games on a tape-delayed basis.[169] Thus, we find that these contracts do not preclude the telecast by local stations of a local college football game on a tape-delayed basis.

115. Second, with respect to live broadcasts, we note that it is questionable whether contracts which contain a "home market exception" are in fact "preclusive contracts" at all, since this type of exception allows local telecasts at any time in the home towns of the participating schools.[170] For example, under the terms of the current ABC/ESPN/CFA agreements, non-ABC and non-ESPN telecasts may be shown at any time in the home town of the participating schools. Similarly, under the CBS/SEC contract, the SEC may permit unrestricted broadcast of any non-network game within its home market. Thus, these contracts are not per se preclusive because they do not explicitly prohibit a local television station from presenting a live local college football game that is not carried, live or tape-delayed, by a local cable system.

116. Third, no party has suggested that contracts that do not contain a "home

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[168] Cable Act of 1992, § 26(c)(1).

[169] No contractual provision prevents local stations from acquiring the rights to these games. However, some conferences, such as the Big 10 and the SEC, have decided to sell the rights to their tape-delayed games to cable sports channels. See INTV 1993 Reply at 16.

[170] We note that neither the 1992 Cable Act nor its legislative history specifically define what qualifies as a "local game." The commenters also do not explain exactly how they define the parameters of the "home market." Counsel for ABC has stated that, for purposes of its CFA contract, although not defined in the contract, the "home market" has generally been interpreted to mean the area covered by a broadcast station serving a college town.

market" exception[171] completely prohibit live local broadcasts. In fact, the record indicates that local telecasts are always permitted if the game start time is appropriately scheduled so as not to conflict with the networks' exclusive time period. While we recognize that the exclusive windows are often the most desirable time periods to broadcast games, we cannot find that contracts without a home market exception are per se preclusive.

117. We are concerned, however, that short notice provisions, which allow games to be chosen for telecast on either six or twelve days advance notice, may restrict the ability of local stations to avail themselves of the opportunity to televise live some local games, making it difficult to effectively produce and market a game or to move the kickoff time so as to avoid exclusive windows.[172] Despite the home market exception, these short notice provisions may indirectly operate to preclude the availability of such games on local stations. These provisions do, however, facilitate wide spread regional or national exposure of the most important and popular games of the season. Nonetheless, if short notice provisions are overly burdensome or restrictive, they might well have effects similar to those of a preclusive contract by decreasing the number of games involving local teams available for broadcast in the local market. While the evidence is unclear whether the decline in certain markets of home team games on local stations is in fact directly attributable to these provisions, it does raise a serious question of whether such provisions have a preclusive effect on local stations' exercise of their rights under the home market exception.

118. Finally, we believe that it is our obligation to analyze the effect of preclusive contracts from a public interest perspective as well. Although we find that overall the viewing public today has more college football games available than ever before -- on both broadcast and cable television -- we recognize that Congressional concern over preclusive contracts focused on the impact of these contracts on local broadcasts. However, as discussed above in Section II.E, we are unable to conclude that preclusive contracts, including those with short notice or broadcast time limitations, have a detrimental effect on local broadcasts. While television coverage of college football games today is provided by more video programming providers than ever before, including broadcast networks, independent stations, syndicators, and national and regional cable sports networks, there is some evidence of a decline in the availability of local team games on local stations. As discussed in greater detail in Section VI below, the Commission remains committed to the public interest goal of

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[171] Contracts without a home market exception include ABC's and ESPN's current contracts with the Pac 10 and proposed contracts for coverage of the ACC (ABC), Big Eight (ABC) and Big East (CBS) beginning in 1996.

[172] The evidence suggests that the majority of the games are subject to short notice provisions. For example, in ABC's Pac 10 contract, approximately 60-67 percent of the games each season are picked on short notice. Pac 10 Comments at 3. It also appears that the majority of the games in CBS' and ESPN's contracts are subject to short notice selection as well. See CBS Reply at 10-13; ESPN Comments at 5-6.

fostering diversity of programming. While we do not find that preclusive contracts have negatively impacted overall program diversity, we are concerned with the availability of local team games on local stations and will continue to monitor developments in this area.

2. Analysis under the Antitrust Laws

119. As required by the statute, we consulted with the Department of Justice on the application of the antitrust laws to the preclusive contracts at issue in this proceeding.[173] In its letter to us, the Department suggested that the lawfulness of these contracts under the antitrust laws should be tested under what is known as a "rule of reason" analysis. According to the Department, in such an analysis, the potential anticompetitive effects of a practice are balanced against the potential procompetitive effects in order to assess whether the contracts have the effect of limiting or increasing output.[174] The Department suggested that in undertaking this analysis, we consider the relevant markets, the market power of sports leagues and programmers, and the efficiencies flowing from the exclusive contracts.[175]

120. As discussed above, we have asked for and have received comments on these factors. The commenters have also referred us to case law and other proceedings, which they suggest are applicable to an antitrust analysis of the preclusive contracts. We believe that these authorities are important to our evaluation of the lawfulness of preclusive contracts, and begin with a review of the applicable law.

121. Section 1 of the Sherman Act[176] prohibits contracts and conspiracies in restraint of trade. In NCAA,[177] the Supreme Court considered whether the various restrictions imposed by the NCAA on its members in the televising of college football games were unreasonable restraints of trade in violation of Section 1. As commenters on both sides of the issue recognize, NCAA is the starting point for any antitrust analysis of the college football practices that are the subject of our Report.

122. In NCAA, the Court noted that NCAA member schools "compete against each other to attract television revenues, not to mention fans and athletes." Relying on factual findings of the lower court after a full trial, the Court observed that the NCAA's television rules prevented members from competing against each other on the basis of price or kind of

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[173] See Notice, 8 FCC Rcd at 1499-1500.

[174] The Department noted that "any such analysis would necessarily depend on the specific facts presented." Id. at 1500.

[175] Id.

[176] 15 U.S.C. § 1.

[177] 468 U.S. 85.

television rights, and restrained the quantity of television rights available for sale, thereby limiting output.[178] These sorts of agreements among competitors are ordinarily condemned as "illegal per se," that is, without the need for further inquiry into market circumstances. The Court, however, declined to apply a per se rule to the NCAA restraints, noting that college football is "an industry in which horizontal restraints on competition are essential if the product is to be available at all."[179] For this reason, even though the trial court found that the NCAA television rules inhibited price and output competition among member schools, the Court concluded that "a fair evaluation of their competitive character requires consideration of the NCAA's justifications as well."[180]

123. The Court, however, rejected the NCAA's argument that its asserted lack of market power vitiated any anticompetitive effects from its television plan. Again, relying on the trial court's factual findings, the Court held that "when there is an agreement not to compete in terms of price or output, 'no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.'"[181] Thus, the Court held as a matter of law that the absence of proof of market power cannot justify a naked restraint on price or output. Rather, a "naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis."[182]

124. While NCAA appears to provide a relatively straight-forward legal framework using a "quick look" rule of reason approach, in our view, its application depends upon detailed factual findings.[183] As we will discuss, we do not believe that the record in this

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[178] Id. at 99.

[179] Id. at 101. See also Chicago Pro. Sports Ltd. v. NBA, 961 F.2d 667, 672 (7th Cir. 1992), cert. denied, 113 S. Ct. 409 (1993) (Easterbrook, J.) ("All agree that cooperation off the field is essential to produce intense rivalry on it -- rivalry that is essential to the sport's attractiveness in a struggle with other sports, and other entertainments in general, for audience.") ("Chicago Pro Sports").

[180] 468 U.S. at 103.

[181] Id. at 109.

[182] Id. at 110. As INTV points out in its reply comments, quoting Chicago Pro Sports, 961 F.2d at 674, under this "quick look" version of the rule of reason, "any agreement to reduce output measured by the number of televised games requires some justification . . . before the court attempts an analysis of market power. Unless there are sound justifications, the court condemns the practice without ado . . . ." INTV Reply at 5-6.

[183] In each case referred to in the record, the appellate court relied on the lower court's factual findings in applying a particular legal standard. See NCAA, 468 U.S. at 99-100 (relying on trial court's findings on absence of price negotiations between broadcasters and

proceeding lends itself to the sort of detailed findings required by NCAA or the rule of reason analysis suggested by the Department. Nor does it appear that in any of the actions cited in the record (which involved contracts similar to the ones at issue here) was there a conclusive finding on the lawfulness of the preclusive contracts.

125. As we noted in our Interim Report, the FTC issued an administrative complaint against the CFA and ABC under Section 5 of the FTC Act,[184] which stressed the alleged similarity between the rules struck down in NCAA and the CFA rules themselves.[185] However, the record reflects that the case was dismissed on jurisdictional grounds relating to the CFA's alleged non-profit status, and an appeal is now pending before that Commission. The following has been put in the record from that case: the complaint, the parties' non-binding pre-hearing statements, and certain interrogatory responses of the CFA. Based on this evidence, we are unable to do more than report that these allegations have been made. Whether these allegations make out a violation of the antitrust laws must await adjudication on the merits.

126. We have similar concerns with a Ninth Circuit decision relied on by INTV.[186] There the California Regents obtained a preliminary injunction against application of a provision in the CFA contracts, which was used by ABC to bar the broadcast on CBS of two games, each involving a CFA member and a non-CFA member California school.[187] The district court, however, did not reach any final conclusion on the merits of the plaintiffs' case or the legality of the CFA contracts. The court did determine, as one element of the standard for granting a preliminary injunction, that the plaintiffs' had "presented serious questions

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institutions); Chicago Pro Sports, 961 F.2d at 672 (where district court characterized defendant as a cartel in the sale of its output, appellate court deferred to trial court's finding); Regents, 747 F.2d at 515-516 (appellate court's review of grant of preliminary injunction, based on lower court's factual findings); see also Notice, 8 FCC Rcd 1499-1500 (Justice Department notes that "any antitrust analysis of preclusive contracts . . . would necessarily depend on the specific facts presented").

[184] 15 U.S.C. § 45.

[185] We note that the FTC also investigated ABC's contracts with the Pac 10 and the Big 10, but did not challenge either of these agreements.

[186] Regents, 747 F.2d 511.

[187] This provision applied to the televising of so-called "crossover" games between CFA and non-CFA schools. The two games involved in the Regents case were a Nebraska-UCLA game, and a Notre Dame-USC game. At the time, CBS had a broadcast contract with the Pac 10-Big 10. The games were at Nebraska and Notre Dame, and UCLA and USC required the consent of the home schools to broadcast the games on CBS.. At the insistence of ABC, the two CFA schools declined to give their consent.

indicating a fair chance of success on the merits."[188] Thus, were we to adopt the Regents case as our own, at most we could only conclude that the CFA/ABC contract in force at the time "raised serious questions" under the antitrust laws.[189]

127. However, we must also take note of the dissent in the case which agreed that while "serious questions" may have been raised by the plaintiffs, the plaintiffs should have been held to a higher standard of proof: "a strong likelihood of success on the merits." The dissent concluded that the likelihood of success on the merits shown by plaintiffs was not sufficiently strong and that close issues were presented for trial. Significantly, the dissent noted that the contract's exclusivity provisions might have a lawful procompetitive purpose -- allowing ABC and the CFA to develop a national college football television package. Moreover, the dissent argued that the agreement could be fairly characterized as a vertical non-price restriction, which would stimulate interbrand competition among competing network television packages.[190]

128. The approach of the dissent in Regents is consistent with the rule of reason approach that the Department of Justice suggested we apply in this proceeding. Significantly, the dissent's reasoning in Regents was also followed by the court in INTV,[191] a case in which INTV challenged, inter alia, predecessor CFA/ABC and CFA/ESPN contracts, similar to those at issue here, and made virtually identical claims about the anticompetitive effect of those contracts. Of particular importance to our analysis is that in its court case against the CFA and ABC, INTV sought a summary determination that the agreements at issue violate the antitrust laws. The court, faced with a record that appears far more developed than the record

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[188] Relying on the trial court's findings, the Ninth Circuit concluded that the CFA contract presented serious questions under both per se and "quick look" rule of reason analyses. The court concluded that a per se approach might be appropriate, because unlike the NCAA's vital relationship to college football found by the Supreme Court (468 U.S. at 101-102), the CFA contract had little bearing on the operative rules of college football. Thus the court held that a per se label might be applied to plaintiffs' boycott and price-fixing allegations. Regents, 747 F.2d at 517. Alternatively, applying the truncated rule of reason analysis, the court held that the ABC/CFA arrangement, like the NCAA television plan, "shares the dual infirmities of an intentional restriction in output along with the imposition of sharp restraints on individual school competition." Id. at 518. The court also rejected the CFA's argument that, rather than being a cartel, the CFA imposes non-price vertical restraints on the ultimate distribution of its product. Id.

[189] We also understand that subsequent to the Regents case, the crossover provision was removed from the contract.

[190] Such vertical restraints have long been approved under the rule of reason analysis.

[191] 637 F. Supp. 1289.

in this proceeding,[192] concluded that questions of material fact on virtually every relevant issue precluded grant of the motion.[193]

129. Thus, for example, the court held on the record before it that INTV had not established beyond dispute that the agreements were naked restraints which would be subject to either per se treatment or the quick look rule of reason under NCAA.[194] Moreover, the court recognized that some horizontal arrangements "even though their force may be felt in usually sacrosanct areas such as price and production, may be justified if their purpose and effect are to increase competition as a whole."[195] In the case of college football, the court noted that notwithstanding the NCAA case,

> [i]n the marketing of television rights, just as in the management of the live contest itself, some cooperation is necessary if the product, live college football television, is to be available at all. Such arrangements should not be denied fair market analysis unless and until it appears that they are naked restraints on competition.[196]

However, on the record before it, the court found that genuine factual disputes precluded a finding that the provisions were naked restraints on price and output.

130. The court also held that the CFA's assertions that it was a legitimate joint venture, and that the restraints permitted the packaging and sale of an otherwise impossible national series of games, if true, entitled the CFA to further market analysis. Moreover, the defendants characterized the arrangements as marketing agreements that impose limited and necessary "intrabrand restraints" in order to enhance interbrand competition.[197] The court, however, noted that, on the record before it, it could not resolve the lawfulness of the restraints:

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[192] In INTV, the plaintiffs alone filed 15 volumes containing more than 1,200 exhibits in support of its motion, and a 28-page statement of undisputed facts comprising 68 numbered paragraphs.

[193] Under Fed. R. Civ. P. 56, a party is entitled to summary judgment if it can show that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law.

[194] 637 F. Supp. at 1296, 1299 n.9.

[195] Id.

[196] Id. at 1297 (emphasis added).

[197] Id. at 1298.

> Since the product of one college football team alone is without apparent value, some combinations of competing institutions must be necessary and therefore reasonable. These combinations also must be capable of enforcing some collective regulation upon their members to achieve intrabrand stability and thus bolster their competitive positions.[198]

Thus, the court felt constrained to determine, as a threshold matter, whether each competitor, pair of competitors, conference, or larger combination of teams constitutes a "brand" of intercollegiate football. Moreover, in order to assess the reasonableness and competitive effect of the restraints, the court was required to determine the market power wielded by the entity imposing the restrictions.[199] The question of market power, however, turned on the definition of the relevant markets in which the defendants competed, which itself was a seriously disputed issue.[200]

131. With respect to output restrictions, the court noted that the alleged anticompetitive effects of each of the challenged provisions were contested. In particular, the court noted that the CFA plan was not as restrictive as the NCAA plan with respect to exception telecasts. The court found that the CFA has an open early afternoon window during which CFA members had the right to sell telecasts of those games not selected by ABC under its contract.[201] INTV complained, however, that requiring teams to move games from the Saturday afternoon schedule reduced output, since many CFA members refuse to reschedule their games. The defendants countered that the plaintiffs had failed to prove that more rather than different games were being telecast. On balance, the court concluded that factual disputes prevented the court from summarily judging the anticompetitive effects of the kickoff time restrictions imposed by the CFA plan.

132. As it does in this proceeding, INTV also complained of the network's right of

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[198] Id.; see also Chicago Pro Sports, 961 F.2d at 676 ("Sharing is endemic in league sports. The prevalence of what is otherwise a hallmark of a cartel may suggest the shakiness of treating the clubs, which must cooperate to have any product to sell, as rival 'producers' in the first place.").

[199] INTV, 637 F. Supp. at 1298.

[200] Id. at 1298-1302.

[201] In contrast, the plan struck down by the Court in NCAA did not give individual schools the right to sell games that were not selected for broadcast. Moreover, the NCAA controlled the entire inventory of college games and had the power to coerce compliance with its television plan. 468 U.S. at 94.

first refusal of the telecast rights to all CFA games until 12 days prior to the date of telecast.[202] Based on the record, the court found that it could not summarily discern whether the agreements were output restrictions, or if they were justifiable and procompetitive. Much as in the instant case, the purposes, necessity, and effect of both the time period exclusivity and the six to 12 day selection deadline were hotly disputed.

133. Using the approach suggested by the Department of Justice and aided by the detailed and thorough analysis of the INTV court, we likewise are unable to determine definitively on the record before us whether the preclusive contracts at issue here violate the antitrust laws. First, with respect to INTV's assertion that the contracts reduce output, we agree, as discussed above, that it may be correct that the number of games on local broadcast stations has decreased. However, without more, we cannot determine whether the preclusive contracts violate the antitrust laws. We note, as discussed above, that the overall amount of college football games on television, including both broadcast and cable, has increased almost fourfold in the past ten years. The record does reflect that Pac 10 exposure has increased as a result of its contracts with ABC and PTN. In addition, we are told that, as a result of time period exclusivity, the packaging of an "ACC Game-of-the-Week" program has become economically viable for distribution over a syndicated network of individual broadcast stations, and that time period exclusivity, first selection of member school games and twelve-day notice provisions all maximize opportunities for consumers to see the best games on a given Saturday. The record is unclear as to whether, in the absence of the preclusive contracts, more games, as opposed to different games, would be shown. The extent to which games that have not been selected for network or cable broadcast are available, but local broadcasters choose not to carry them, is likewise unclear. Nevertheless, there is some evidence in the record of a decline in some markets of local team games broadcast on local stations.

134. Second, even if we could conclude with some certainty that the preclusive contracts limit output in an antitrust sense, we cannot say with any degree of certainty, for the reasons indicated by the INTV court, that the restraints described in the record before us are unreasonable as a matter of law. As discussed above, the record reflects evidence adduced by several commenters that time period exclusivity provisions in their contracts with college football conferences are actually procompetitive and are the result of intense competition among telecasters.[203] There is also evidence in the record from ABC that these preclusive

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[202] As noted above, this right of first refusal may now be exercised six to 12 days prior to telecast.

[203] INTV relies on the FTC proceeding and, in particular, on Complaint Counsel's Non-Binding Statement, supra note 160, for the proposition that time period exclusivity provisions are not procompetitive. We agree with commenters ARC and ESPN that INTV's reliance on the "finding" by the FTC is misplaced. ARC Reply at 18; ESPN Reply at 3-4. As we discussed above, there has been no adjudication of these questions in the FTC proceeding, and we believe it is inappropriate to rely on these materials as a basis for a finding that

contracts create significant efficiencies which increase the size of a network's viewing audience, thus enhancing the value of these telecasts to advertisers.

135. Third, the record reflects the view of certain commenters that college football contracts allow the most efficient distribution of an attractive package of college games. As discussed above, a number of courts and commenters have recognized the plausibility of this efficiency-enhancing justification. The conundrum with which we are faced, i.e., whether the antitrust laws will condone an association of conferences and independent schools the size of the CFA as an efficiency-enhancing procompetitive vertical arrangement or condemn it as a cartel, has never conclusively been resolved by a court and cannot be resolved on this record.[204] In the absence of an answer to that question, we simply cannot conclude whether the agreements at issue violate the antitrust laws.

136. Finally, with respect to the question of the market power of any of the participants and the definition of the relevant market, as discussed supra, we are faced with virtually the same conflicting evidence and allegations as the INTV court, and conclude that the record is insufficient to conclude with any certainty whether any of the preclusive contracts involve the use of market power, and indeed, what the relevant markets are. Although INTV argues that NCAA and INTV require us to define the market as broadcasts of intercollegiate football games, the INTV case is inconsistent with INTV's position, and commenters question the continued applicability of factual determinations made in NCAA as to the relevant product market.[205] Nor are we persuaded to adopt ABC's much broader definition of the market -- including all sports and other entertainment programs -- without a more detailed factual analysis of the market, which neither ABC nor any other party has provided.

137. In sum, the so-called "preclusive contracts" at issue in this proceeding raise

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challenged activities violate the antitrust laws.

[204] See INTV, 637 F. Supp. at 1296. We also note that similar questions will likely face the various college leagues as the CFA is replaced with similar arrangements at the conference level beginning in 1996, and that many of the arguments used to justify the CFA, become even more compelling at the conference or league level. See INTV, 637 F. Supp. at 1298. See also Chicago Pro Sports, 961 F.2d at 672 (noting "lively debate" as to whether a sports league is a separate entity capable of conspiring with itself); INTV, 637 F. Supp. at 1299 n.8 (finding triable issue as to whether sports leagues are comprised of separate entities capable of conspiring).

[205] The record reflects that there have been significant changes in the television industry and the college football industry since these cases were decided: cable is now available to considerably more homes; television coverage of college football games has increased overall; and college football associations have broken apart into smaller organizations representing a smaller number of schools.

questions under the antitrust laws that do not lend themselves to easy answers. While we do not intend to prejudge the legality of any of these arrangements, we certainly cannot say with any degree of certainty based on the record in this proceeding that these arrangements are completely consistent with the antitrust laws. However, as noted above, we are concerned that college football contracts which have these restrictive provisions, i.e., provisions relating to notice and time of broadcast of local games, may have preclusive effects on the incentive and ability of local broadcasters to televise local team games, and thus we will continue to monitor this area. If evidence should develop in the future that the public interest is being harmed by a decline in the availability of local broadcasts of such games, we can initiate proceedings to determine what measures would be appropriate to safeguard the public interest.

IV. SPORTS SIPHONING RULES

A. Background

138. Prior to our Interim Report, the majority of commenters stated that the record did not warrant any legislative recommendations or regulatory action with respect to migration of sports programming. In our Further Notice, we invited comment on whether there is a public interest in government action to promote free access to sports programming. We asked commenters advocating sports migration rules to address the Commission's authority to adopt such rules in light of the HBO decision.[206] In that case the D.C. Circuit vacated the FCC's siphoning rules leaving no pay cable programming rules in effect. We requested that commenters include any relevant changes in circumstances since that case was decided in 1977.[207]

139. In the HBO case, the Commission attempted to justify rules that would prevent siphoning of sports material from conventional broadcast television to pay cable. The Commission maintained that it was obligated to impose siphoning rules because "the overall level of public enjoyment of television entertainment would be reduced if sports events were shown only on pay cable or shown on conventional television only after some delay." Specifically, the Commission believed that its "mandate to act in the public interest" required that it strive to maintain the public's ability to receive free access to sports programming on broadcast television.[208] The United States Court of Appeals for the District of Columbia Circuit disagreed, finding no reasonable public interest justification for imposing siphoning restrictions on cable carriage of sports programming.[209]

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[206] Home Box Office v. FCC, 567 F.2d 9 (D.C. Cir. 1977), cert. denied, 434 U.S. 829 (1977) ("HBO").

[207] Further Notice, 9 FCC Rcd at 1650.

[208] HBO, 567 F.2d at 28-29.

[209] Id. at 9.

140. Aside from jurisdiction, another major obstacle to siphoning rules is the First Amendment. The HBO court applied the three-prong test from United States v. O'Brien[210] to the FCC's siphoning rules. Any adoption of siphoning rules must meet the requirements of this test.[211] First, the purpose of the rules must be neutral and unrelated to the suppression of free speech. Second, the rules must further an important or substantial governmental interest. Third, the incidental restriction on First Amendment freedoms must be no broader than is essential to further that interest. Despite the fact that the siphoning rules met the first prong,[212] they were held to violate the First Amendment because they failed to meet the second and third requirements.[213]

B. Comments

141. INTV argues that the marketplace has changed significantly since the Court's 1977 HBO decision; it asserts that cable is no longer the fledgling industry that it was in the mid-1970's and that the premises underlying the HBO decision no longer apply. INTV believes that the current evidence clearly illustrates the problem of sports siphoning, and that such siphoning must be checked in order to safeguard the public interest in free television. Therefore, INTV contends that the governmental interest in protecting against siphoning is sufficiently important and that the second prong of the O'Brien test can now be met. INTV also claims that the third prong of O'Brien, that of narrow tailoring, can also be satisfied. INTV states that the old siphoning rules treated many diverse types of programming equally.

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[210] 391 U.S. 367 (1968).

[211] The D.C. Circuit applied the O'Brien standard in HBO, even though the siphoning rules at issue in that case encompassed all entertainment, including sports programming. Many commenters believe that if the FCC were to adopt rules specifically regulating sports programming, the courts would consider such rules to be a content-based restriction on speech, and therefore deem them presumptively unconstitutional and subject to strict scrutiny. See, e.g., Supplemental Further Comments of the NBA, NFL, NHL and MLB at 3-9, filed May 18, 1994; see also R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2542 (1992). For purposes of our analysis, however, we use the less demanding O'Brien standard in light of the court's instruction in the HBO decision.

[212] The court held that the siphoning regulations met the first requirement because the government purpose in regulating pay cable -- protecting viewing rights of those without cable -- is not intended to curtail expression and is neutral in character. HBO, 567 F.2d at 48.

[213] The court held that the government interest was not demonstrated to be important or substantial because the problem of siphoning was not convincingly shown to exist. In addition, the court found the regulations to be overbroad, stating that for overbreadth purposes, restricted programs not broadcast must be readily available to cablecasters. Id. at 51.

According to INTV, a new rule aimed precisely at specific sports and/or the elimination of preclusive contracts can be sufficiently narrowly tailored to meet the First Amendment requirements as set forth in HBO.[214]

142. Many commenters believe that nothing submitted during this proceeding should change the conclusions reached in HBO.[215] ABC contends that there is no basis for further legislative or regulatory intervention concerning the telecasting of college football or other sports.[216] Rainbow believes that cable has expanded the availability and diversity of sports programming, and that the FCC should refrain from adopting any rules that would artificially constrain cable's ability to compete in the sports licensing rights market.[217] ESPN states that the sale of telecasting rights to sports events is subject to an ever changing set of circumstances at the national, regional, and local level, which define at any given moment who the buyers and sellers are, what rights are for sale and at what price. ESPN argues that this system should not be disturbed by regulation or legislation which cannot possibly predict the future. ESPN adds that, given the large and growing range of sports programming available today, governmental action is not warranted.[218] Tribune believes there is a strong governmental interest in promoting free public access to televised sports programming and submits that Congress should consider various ways to promote such access.[219] Southland, however, asserts that regulations restricting cable carriage of sporting events would not serve the public interest.[220]

143. In addition to considering whether siphoning rules would serve the public interest, many commenters raise concerns regarding the First Amendment implications of such rules. Specifically, ESPN believes that siphoning rules would implicate First Amendment concerns by abridging colleges' right to choose their means of communicating. ESPN adds that sports migration rules would be content-based regulations and thus unconstitutional, or at least subject to strict scrutiny.[221] MLB contends that siphoning rules, which restrict the ability

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[214] See INTV Comments at 38-43; INTV Reply at 49-54.

[215] See, e.g., ARC Comments at 18-22; ARC Reply at 24-26; ABC Comments at 22-24; NCTA Reply at 5; NHL Reply at 2.

[216] ABC Comments at 20-24.

[217] Rainbow Comments at 5-6.

[218] ESPN Comments at 7.

[219] Tribune Comments at 2.

[220] Southland Comments at 3.

[221] ESPN Reply at 5-6.

of sports clubs to place programming on different media, raise serious constitutional problems -- particularly where such restrictions are not imposed upon other programmers with which sports clubs must compete for access to broadcast and subscription services.[222] The NHL argues that INTV's proposed remedy -- the reimposition of sports siphoning rules -- is both economically unnecessary and fails to pass constitutional muster.[223] NCTA states that, regardless of the growth of the cable industry since 1977, the HBO court's First Amendment objections to the Commission's previous siphoning rules are still applicable today.[224]

C. Findings

144. The purpose of sports siphoning rules would be to give those not served by cable broader access to sports programming and to maintain a consistent level of free sports programming for the general viewing public. As we noted above, the majority of commenters believe the record does not warrant legislative recommendations or regulatory action. Based on our evaluation of the record, we conclude that siphoning or migration of sports programming is not sufficiently prevalent to justify intervention at this time.[225] We therefore do not recommend adoption of siphoning legislation or regulations at this time.

V. ANTITRUST EXEMPTIONS

A. Background

145. The Sports Broadcasting Act of 1961 generally exempts television exhibition agreements entered into by professional football, baseball, basketball, and hockey leagues from the federal antitrust laws.[226] In addition, professional baseball enjoys a broader exemption from the antitrust laws.[227] In the initial Notice, we requested comment on the

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[222] MLB Comments at 4.

[223] NHL Reply at 2.

[224] NCTA Reply at 5.

[225] The HBO court stated that "where the First Amendment is concerned, creation of such a rebuttable presumption of siphoning without clear record support is simply impermissible." 567 F.2d at 51.

[226] 15 U.S.C. §§ 1291-1295. The Act provides for certain limitations to this antitrust exemption which are not relevant to our discussion herein. Note, however, that the Sports Broadcasting Act applies only to the specified professional sports and does not apply, for example, to college football.

[227] Federal Baseball Club v. National League, 259 U.S. 200 (1922); see also Flood v. Kuhn, 443 F.2d 264, 268 n.8 (2d Cir. 1971), aff'd, 407 U.S. 258 (1972).

extent to which sports distribution contracts would be different absent the antitrust exemptions provided to professional sports.[228] As indicated by the Interim Report, however, few commenters responded to the Commission's inquiry. The commenters who did address this issue asserted that the Sports Broadcasting Act ensures wide-spread availability of professional sports to the viewing public, and that the shared revenues generated through television contracts have allowed for league expansions, thus increasing the overall number of games televised. The commenters accordingly did not recommend revision of the Act.[229] The Further Notice again invited comment on the effect of the antitrust exemptions on sports programming availability.[230]

B. Comments

146. Subsequent to issuing the Interim Report, we solicited additional comments on antitrust exemptions, but few parties responded to that solicitation. Most of the commenters who expressed concern about the antitrust exemptions discussed the exemptions in the context of MLB. INTV claims that MLB has the unique ability to control and limit the supply of games to be telecast, and that the exclusivity arrangements MLB has with the broadcast and cable networks directly relate to MLB's government-sanctioned monopoly. Because MLB is not subject to the same pressures as other program suppliers, INTV submits, MLB can restrict the supply of games in order to increase its revenues.[231]

147. The Major League Baseball Players Association ("MLBPA") asserts that MLB's exemption from the antitrust laws raises serious questions about the protection of the public interest in connection with the telecast of baseball games over all media, including broadcast, basic cable and pay-per-view. MLBPA states that MLB's exemption allows it to organize its telecasts without regard to antitrust laws or to any other form of public scrutiny, and that this does not suggest that the public interest will be considered, much less protected. Because of MLB's antitrust exemptions, MLBPA claims, the MLB team owners "get to decide whether to serve the public interest, and, indeed, what that interest is."[232] MLBPA also comments that MLB's new television contract, which replaces previous years' nationally televised play-offs with a regional format, would be subject to review if the antitrust laws

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[228] Notice, 8 FCC Rcd at 1496.

[229] Interim Report, 8 FCC Rcd at 4890.

[230] Further Notice, 9 FCC Rcd at 1651; see also Markey Letter.

[231] INTV Reply at 35-36.

[232] MLBPA Comments at 2.

applied to baseball.[233]

148. Sports Fans United, Inc. ("SFU"), believes that MLB's antitrust exemptions allow it to control supply and demand in ways that harm consumers and limit fans' access to televised baseball. SFU states that MLB has divided North America up into exclusive television territories, resulting in fans seeing far fewer baseball games than they would without MLB's antitrust exemption. SFU also believes that baseball's exemption allows MLB to limit the number of teams to fewer than the market will support, which in turn allows teams to threaten to relocate. Consequently, according to SFU, cities have little bargaining leverage with baseball teams.[234]

149. SFU also believes that Congress effectively provided an antitrust exemption to the NFL "through its congressionally approved merger with the AFL," which allows the NFL to maintain an "artificial scarcity" of televised games. The NFL's monopoly power is further enhanced, SFU contends, by the Sports Broadcasting Act. SFU states that it does not object to the Act in its entirety, as it is important to the survival of smaller market teams, but that Congress did not intend the Act to apply to anything other than broadcast television, which means to SFU that the NFL's national cable contracts are a violation of the antitrust laws.[235] With respect to the NBA and the NHL, SFU urges the Commission to ask the Justice Department to investigate both the NBA's and the NHL's exclusive home market television territories to ascertain the extent to which consumers are being harmed by these practices.[236]

150. In addition, Tribune notes that, in its litigation against the NBA,[237] the NBA has claimed that the Sports Broadcasting Act immunizes from antitrust attack the NBA's "Same Night Rule," which limits superstation carriage of NBA games. Tribune asks that our Report advise Congress of the NBA's position in this case.[238]

151. MLB did not address the antitrust exemptions in its comments in this proceeding. On the other hand, other parties discussed the benefits of the antitrust immunities

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[233] Id. MLBPA does not, however, go so far as to state that this arrangement would violate federal antitrust laws if it were not for MLB's exemptions.

[234] SFU Comments at 5-6.

[235] Id. at 7-8.

[236] Id. at 9.

[237] Chicago Pro Sports v. NBA, No. 90 C 6247 (N.D. Ill.), supra Section II.B.

[238] Tribune Comments at 2-5. This matter is currently pending before the court. In this case, we decline to express a view on whether the Sports Broadcasting Act would sanction the NBA's superstation restriction.

in connection with other sports. For instance, the NHL states that the Sports Broadcasting Act has advanced the interests of fans and consumers by enhancing the ability of sports leagues to market national broadcast packages. According to the NHL, any repeal or modification of the Act would fragment the sale of television rights and would result in fewer games on broadcast television.[239]

152. Similarly, Turner states that the antitrust immunity granted by the Sports Broadcasting Act has increased the financial stability of the leagues as well as the individual teams. Turner asserts, however, that the compulsory license has served as an important counterbalance to this immunity, and that without the compulsory license, leagues could prevent superstation sports carriage.[240]

153. The NBA suggests that consumers have been well served by the ability of professional sports leagues to make joint national sales of exclusive television packages to broadcast networks. Without the Sports Broadcasting Act, the NBA states, every deal could be subject to antitrust attack by an unsuccessful bidder for national rights. Ensuring that such contracts may be entered into without antitrust challenge thus facilitates national over-the-air arrangements.[241]

C. Findings

154. While the foregoing provides a useful summary of the commenting parties' perspectives with respect to the antitrust exemptions provided to the professional football, baseball, basketball and hockey leagues, the record before us does not provide us with sufficient information to support either the repeal or the modification of the Sports Broadcasting Act or MLB's antitrust exemption. Accordingly, we cannot, at this time, recommend modification of the Sports Broadcasting Act or MLB's antitrust exemption.

VI. POLICY ISSUES

155. This section examines INTV's critique of our definition of migration, the potential causes and consequences of migration, the NFL's plan to offer out-of-market games to sports bars and home satellite dish subscribers, and the impact of pay media on the availability of other sports programming. Our discussion of potential causes and consequences will encompass the issue of "whether there is a public interest in government action to promote free access to sports programming,"[242] and the impact of changing

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[239] NHL Comments at 5.

[240] Turner Comments at 8.

[241] NBA Reply at 2-3.

[242] Further Notice, 9 FCC Rcd at 1650.

technology on the future availability of sports programming.

A. The Definition of Migration

156. In the Interim Report we noted that the ideal way to measure sports programming migration would be to compare the number of games actually shown on broadcast television with the number of games that would be broadcast if there were no non-broadcast video distributors.[243] We rejected this standard on the grounds that projections of games broadcast in the absence of subscription media are too speculative and retained our working definition of migration as the movement of sports programming from broadcast television to a subscription medium. One commenter, INTV, challenges this definition and suggests that we should assume that, in the absence of subscription media, the number of sports events on broadcast television would be higher than it is in the presence of subscription media.[244]

157. INTV supports its proposal by arguing that cable networks compete with television broadcasters for sports rights, and if broadcasters had no competitors bidding against them, they would acquire rights to more games. We decline to accept this argument. Television broadcasters have a wide range of programming, both sports and non-sports, from which to choose. They attempt to assemble the most profitable schedule that they can, comparing the expected advertising revenue from each program to the cost of acquiring it. Several commenters have suggested that the emergence of the Fox network has provided new and valuable programming that, in some cases, stations find more attractive than certain sports events.[245] It is possible that, in the absence of subscription media, television broadcast rights fees would be lower (because there would be fewer bidders contending for those rights), but it is not clear how this would effect the relative profitability of sports and non-sports programming. We do not know how much lower these fees might be, and we do not know how viewer interest (i.e., ratings) would change as the number of games broadcast increased. This makes it impossible to calculate how profitability, i.e., the difference between revenue and cost, might differ in the absence of subscription media.

158. Although INTV agrees that if cable and broadcast stations are negotiating for different games or different rights packages, then the Commission's approach to assessing migration is appropriate, it asserts that this scenario does not apply to various major sports. INTV's view of the market does not seem consistent with our findings with regard to MLB telecasts, one of INTV's two areas of concern. There is a striking difference in the type of games broadcast and those cablecast -- in particular, local broadcasts are overwhelmingly of away games, while cablecasts show no such pattern. Broadcast of away games poses no

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[243] Interim Report, 8 FCC Rcd at 4877.

[244] INTV Comments at 1-5.

[245] See MLB Comments at 10-11; Turner Comments at 5-6; see also MLB Reply at 11.

threat to the live gate.[246] If, in fact, teams prefer to license home games to cable networks, because they feel that the need to subscribe to cable provides some protection to the live gate or that cable rights fees provide some compensation for any decline in attendance caused by cable viewing, then home games and away games may be reasonably understood as "different rights packages." MLB data on flagship telecasts for 1994 show that 72.5 percent of local broadcasts are of away games.[247] If one eliminates games on superstations WTBS and WGN (which provide separate national feeds with national advertising, the revenue from which balances some or all of the negative impact on the live gate of local broadcast of a home game), the figure is 77.7 percent. Eliminating the six other superstations (which may receive some increased revenue from national spot advertising sales and for whose cable carriage MLB receives some compensation via the compulsory license)[248] yields a figure of 82.6 percent. Updated figures from MLB regarding regional cable network telecasts show a similar but slightly less pronounced pattern. For the 1994 season, 63.8 percent of regional cable telecasts were of home games and 36.2 percent were of away games.[249]

159. Similar patterns prevail for NBA and NHL telecasts. (Since all NFL games are distributed by national networks, the comparison makes no sense in the NFL context.) During the 1993-94 season, 85.8 percent of local NBA broadcasts were of away games, and 70 percent of regional cable network cablecasts were of home games.[250] With regard to the NHL, during the 1993-94 season, 83.2 percent of local broadcasts were of away games, and 57.9 percent of regional cable network cablecasts were of home games.[251] These data are also relevant to the question of why the increase in cable exhibition of sports events has been

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[246] See MLB Comments at 13-14 (teams have a strong interest in protecting the live gate).

[247] MLB Comments at Exhibit 1.

[248] Turner estimates the current level of those payments to be $20 million and notes that individual superstations also compensate MLB for their wide distribution of local games. Turner Comments at 7-8.

[249] Ex Parte Letter from Bruce Henoch, Counsel for the Office of the Commissioner of Baseball, to Jonathan D. Levy, Office of Plans and Policy, Federal Communications Commission (May 18, 1994).

[250] Ex Parte Letters from Philip R. Hochberg, Counsel for the National Basketball Association, to Jonathan D. Levy, Office of Plans and Policy, Federal Communications Commission (May 25, 1994 and June 1, 1994).

[251] NHL Comments at Appendix A, and Ex Parte Letter from Philip R. Hochberg, Counsel for the National Basketball Association, to Jonathan D. Levy, Office of Plans and Policy, Federal Communications Commission (May 31, 1994).

greater than the increase in broadcast exhibition.[252] Few commenters address this issue directly, but the NHL and NCTA both endorse the hypothesis, advanced tentatively in the Further Notice that the base level of cable coverage in 1980 was lower than the base level of broadcast coverage, leaving more "room for expansion" in cable coverage.[253] The data on current local coverage of MLB, NBA, and NHL games demonstrate that broadcast coverage is overwhelmingly of away games and that cable coverage is primarily of home games. Comparable data on broadcast coverage in earlier years show that, in 1980, 74.4 percent of MLB local broadcasts were of away games; in 1982-83, 90.5 percent of NBA local broadcasts were of away games; and, in 1981-82, 85.2 percent of NHL local broadcasts were of away games.[254] These figures are consistent with cable coverage expanding primarily by exhibiting games that were not previously available for broadcast.

160. These considerations lead us to retain our definition of sports programming migration and to reject INTV's claim that an increase in cable carriage provides per se evidence of sports programming migration. We agree that, in situations where broadcast carriage of sports programming has increased over time, we cannot rule out the possibility that, in the absence of subscription media, it would have increased by an even greater amount. We address this issue further in the subsection on potential causes and consequences of migration below.

B. Potential Causes and Consequences of Sports Programming Migration

161. We have concluded that only a small amount of sports programming migration has occurred, and virtually all of the commenters concur with this assessment. Nevertheless, because we wish to assess trends in sports programming exhibition, it is appropriate to consider how changes in video markets might affect future exhibition of sports programming. Moreover, we believe that, in order to respond adequately to those whose initial assumptions lead them to conclude that substantial migration has occurred, we should outline the consequences of migration and provide a suitable scheme for further analysis.

162. The most salient fact about video distribution since 1980 is the vast expansion

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[252] Further Notice, 9 FCC Rcd at 1651.

[253] See id.; see also NHL Comments at 5 ("Prior to 1980, sports was televised on broadcast television or not at all, and there is accordingly much more room for growth on cable than on broadcast television."); NCTA Comments at 3 (agreeing with the "more room for expansion" suggestion and noting the "remarkable growth and development of diverse satellite cable services, including national and regional sports networks" in the 1980's).

[254] MLB Ex Parte Letter, supra note 58; NBA 1993 Comments, Exhibit 6; NHL 1993 Reply, Appendix A.

in channel capacity, both within broadcast television and from non-broadcast media.[255] Moreover, as several commenters point out, the development of the Fox network has increased competition in program supply to broadcast stations. Press reports indicate that two additional national broadcast networks may be formed soon. The expansion in broadcast capacity has increased fragmentation of the television broadcast audience. This and the increasing competition in program supply have likely reduced the relative attractiveness of certain sports programming. Parties such as MLB, MSG, and Time Warner suggest that, as fewer truly independent stations remain in local markets, the demand for local sports programming may decline.[256] The expansion of cable offerings has also fragmented the video audience. This would be true even if there were no cable sports networks at all. Hence, the impact of cable on the market for sports programming goes beyond the mere addition of another bidder for local rights as suggested by INTV. The audience fragmentation is, to some extent, inherent in the nature of cable television; sports siphoning rules, even if otherwise legal and appropriate, would not eliminate it.

163. Thus, if sports migration does occur, it might be explained in part by irreversible changes in the structure of the video delivery market. For that reason, it is important to consider the economic and social consequences of migration. In the Further Notice, we cited trade press statistics that 98 percent of television households were passed by cable.[257] No one contested those figures. Moreover, cable sports networks are also available via other media, such as home satellite dish and wireless cable.[258] It appears that many of these services will also be available via the new Direct Broadcast Satellite ("DBS") Service. In general, then, the consequence of migration is likely to be not loss of access to sports programming, but the need to pay a fee to acquire it, frequently as part of a larger package of non-broadcast channels.

164. We understand that ESPN is not a premium service and that most of the

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[255] See Florence Setzer and Jonathan Levy, Broadcast Television in a Multichannel Marketplace (Office of Plans and Policy Working Paper No. 26, Federal Communications Commission) (June 1991).

[256] One possible response to this is spreading local broadcasts over two or more stations in order to minimize the need to preempt other scheduled programming to accommodate sports. MLB offers two examples of this type of arrangement for local baseball telecasts during the 1994 season. The Baltimore Orioles and the Minnesota Twins each share their local broadcasts between two stations -- a network affiliate and an independent. MLB Comments at Exhibit 1.

[257] Further Notice, 9 FCC Rcd at 1650-51.

[258] See, e.g., ARC Comments at 23-24; ESPN 1993 Comments at 1.

regional cable networks are not premium services.[259] Thus, as ARC points out, most cable sports channels are on tiers subject to local or Commission rate regulation in the absence of effective competition. ARC argues that, in most cases, we can assume that the rates will be held to "reasonable" levels. The implication is that subscribing to cable at regulated rates to acquire sports programming is not burdensome. ARC also points out that vertically-integrated cable sports networks are subject to Commission program access regulations, which will ensure that rival delivery systems (and their subscribers) have nondiscriminatory access to those networks.

165. Few commenters explicitly addressed the issue of whether there is a public interest in government action to promote free access to sports programming. INTV points out that professional and college teams generally receive public subsidies of one kind or another, such as direct appropriations from state legislature, tax concessions, or assistance in raising funds for stadium construction.[260] INTV argues that this creates an obligation on the part of the teams to provide a certain amount of programming on broadcast television. INTV suggests no standards for deciding how much is appropriate, nor does it explain why the relevant government agencies could not condition their subsidies on provision of broadcast coverage of certain games. Presumably these agencies weigh the pros and cons of appropriations and subsidies prior to granting them and do not do so unless they determine that they bring an acceptable level of public benefits. INTV also refers to the antitrust exemptions under which professional sports operate. While Congress certainly could condition the Sports Broadcasting Act exemptions on some minimum level of broadcast exhibition, any level chosen would be arbitrary. For this reason, and because the Commission seeks to foster overall program diversity, encompassing not only sports but also other varieties of programming, we decline to recommend a minimum sports programming requirement.

166. SFU asserts that "the nation's professional and collegiate sports teams have a responsibility to keep the vast majority of their games accessible and affordable to the public that supports them" and notes that this support includes "a range of subsidies, tax breaks, and antitrust exemptions."[261] Like INTV, SFU proposes no standard for determining the appropriate level of broadcast coverage. It is not clear whether SFU's "accessible and affordable" criterion includes cable carriage. The other commenter that addresses this issue, albeit indirectly, is the National Licensed Beverage Association ("NLBA"). Its advocacy of a new compulsory license for sports bar carriage of sports programming is discussed below.

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[259] See INTV Comments at 28 n. 26; MLB Comments at Exhibit 3; ARC Comments at 22-24.

[260] INTV Comments at 5.

[261] SFU Comments, Introduction (filed May 6, 1994). In the interest of assembling a complete record, we accept this late-filed submission.

167. The Commission has always sought to promote the availability of a broad and diverse menu of programming to the American public. We recognize that sports is an important component of that menu, but there are, of course, others as well. We cannot determine what is the "right" amount of sports programming on broadcast television. The record in this proceeding shows that there is a tremendous amount of sports programming on broadcast television and that, for most of the sports and geographic markets that we have studied, it is increasing. The "marquee" events, such as the Super Bowl, the World Series, the NBA Championships, and the NCAA basketball championships, remain on broadcast television. While many households decline to subscribe, cable or other multichannel video programming distributors are available to the overwhelming majority of viewers. Those media offer a vast additional amount of sports programming that, in general, supplements broadcast offerings. Based on this record, we discern no case for additional government intervention in the sports programming market at this time. As noted above, however, we are concerned with the decrease in the availability of local college football games on local stations, and if evidence of injury to the public interest is demonstrated, appropriate action will be taken.

C. The NFL "Season Ticket" Package

168. The NFL has announced that its new broadcast contracts call for encryption of the backhaul and network distribution feeds of NFL games.[262] Beginning with the 1994 season, the NFL plans to offer a "season ticket" package of out-of-market games to dish owners and certain commercial establishments, including sports bars. The NFL states that encryption is necessary to prevent "rampant" piracy, i.e., unauthorized viewing by "individual homes, sports bars and other commercial establishments."[263] The NFL package will include all Sunday afternoon regional telecasts except for those blacked out in the area pursuant to the NFL's blackout policy. The annual subscription fee for 1994 will be between $100 and $140 for dish owners (for a 17 week season) and $700-$2500 for sports bars depending on their seating capacity. The NFL will market the season ticket package through multiple non-exclusive distributors.[264] The NFL asserts that this program does not reduce the number of games being broadcast but rather "extends a number of previously regional telecasts to a national audience."

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[262] See NFL Comments at 7-10.

[263] Id. The NFL asserts that interception of its unscrambled feeds is unlawful under the Copyright Act. The Commission has determined that unauthorized reception of network feeds is also prohibited by the Communications Act. See Report in Gen. Docket 86-336, 2 FCC Rcd 1669, 1694-98 (1987).

[264] NFL lists Showtime, Netlink, Superstar Satellite Entertainment, Programmers Clearing House, and National Programming Service among its distributors. Turner indicates that it will be a distributor to the home dish and commercial markets and that ESPN will also sell this package to the commercial market. Turner Comments at 3-4.

169. NLBA, which represents sports bars and other commercial establishments which seek access to broadcast sports events, expresses concern with the announced cost of the NFL package, calling it "prohibitive."[265] NLBA notes that various bars have been sued under the Communications and Copyright Acts for unauthorized reception of sports programming and reports that in "almost every instance, bar owners were found guilty of unauthorized reception of sports programming and, in many cases, were held liable and assessed penalties of more than $100,000." NLBA expresses concern that other sports leagues will develop packages similar to the NFL program and urges the Commission to recommend passage of a bill to provide places of public accommodation a compulsory license to exhibit video coverage of games between professional sports teams and to direct the Copyright Royalty Tribunal to establish reasonable fees for such license.

170. Satellite Receivers, Ltd. ("SRL"), a distributor of home satellite equipment and programming, objects to not having been appointed a distributor of the NFL package.[266] SRL suggests that the NFL should set standard qualifications for distributors and accept all who meet them. SRL asserts that it is prepared to conform to any specified requirements. In response, the NFL asserts that it has "developed reasonable, non-exclusive distributor qualifications criteria" and that they have been "applied in a fair and even-handed manner."[267] Moreover, the NFL "remains open to working with any party, including SRL, which is willing to make the investments in marketing and customer service personnel and facilities that are required to promote the product and provide service to subscribers."[268]

171. As a threshold matter, we do not see the NFL package as a sports migration issue. It appears to be a net addition to output and to the choices lawfully available to dish owners and commercial establishments. We have no basis to question the announced price structure of the package, and thus no reason to endorse the proposed new compulsory license for sports bars. With regard to SRL's complaint, the NFL has appointed several non-exclusive distributors for its package and it is clear that dish owners and commercial establishments will have multiple options for subscribing. These factors, along with NFL's stated willingness to explore relationships with other prospective distributors, including SRL, lead us to conclude that the initial SRL complaint raises no public interest issues.

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[265] NLBA Comments at 1-3.

[266] SRL Comments at 1-3.

[267] NFL Reply at 2-3.

[268] Id.

D. The Impact of Pay Media on the Availability of Sports Programming

172. With regard to the impact of new media and the expected expansion of channel capacity on sports programming, it is difficult to do more than speculate.[269] To the extent that new media such as DBS attract subscribers who do not have access to cable or choose not to subscribe, access to sports programming will likely increase. Expanded channel capacity will likely have the same effect. More specifically, expanded channel capacity is likely to lead to increased out-of-market pay-per-view services. The NFL plan to offer a "season ticket" program of ten to twelve out-of-market games per week throughout the season to dish owners and sports bars may be an indication of things to come.[270] This package will be distributed via C band satellite, a medium that already offers hundreds of channels. As cable channel capacity expands, it is possible that this (and perhaps other analogous packages yet to be created) will be made available to cable subscribers. Indeed, on a limited scale, ABC has been distributing a few out-of-market college football games each week since 1992 to cable operators.[271] We agree with the NHL that such out-of-market distribution should be construed as a net addition to output and not an example of sports migration.[272] On balance, it is likely to expand and enhance access to sports programming, particularly niche audiences such as fans of the Washington football team who live in Dallas. We received little specific comment regarding the future of pay-per-view sports. Those parties who addressed pay-per-view generally stated that their activities in this area are limited; some also indicated that they have no current plans to institute pay-per-view service.[273]

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[269] We do know, however, that the current pattern of national broadcast and cable exhibition of the four major professional sports examined herein will continue for the next three to five years. Specifically, the NFL broadcast and cable contracts expire after the 1997 season (NFL Comments at 5), the NBA broadcast and cable contracts expire after the 1997-98 season (NBA Comments at 4-5), the NHL cable contract expires after the 1996-97 season (ESPN Comments at 4), and the MLB broadcast and cable contracts expire after the 1999 season (NBC Comments at 4; ESPN Comments at 2).

[270] See infra Section VI.C.

[271] Overall, the record indicates that the number of college football games distributed on a pay-per-view basis is minimal, and it does not appear that the use of pay-per-view will increase significantly in the future. See infra ¶ 103.

[272] See NHL Comments at 5.

[273] See NHL Comments at 5 (pay-per-view in the NHL is "extremely limited and entirely local"); Turner Comments at 8 (neither the Atlanta Braves nor the Atlanta Hawks have "any current plan to develop a pay-per-view sports package"); Pac 10 Comments at 2 ("Pay-per-view has not yet been and probably never will be a substantial factor for regular-season college football." Pac 10 1993 pay-per-view revenue was $20,000); see also Interim Report, 8 FCC Rcd at 4889-90.

VII. RECOMMENDATIONS AND CONCLUSIONS

173. In this inquiry, we have made an exhaustive examination of trends in the video exhibition of sports programming, focusing on professional football, basketball, hockey, and baseball, and on college football and basketball. We defined sports programming migration as the movement of sports programming from broadcast television to subscription media, and we examined national, regional, and local exhibition trends. By and large, the record established in response to the Further Notice confirms our earlier tentative conclusions. We see no evidence of migration of NFL or college basketball games. At the national level, we see no evidence of migration of NBA or NHL games. Indeed, the NHL seems to be a case of reverse migration at the national level. At the local level, the NBA record shows declines in broadcast coverage in a few markets and the less complete NHL record shows a decline in broadcast coverage in some local markets. We do not see a trend away from local broadcast coverage of NBA and NHL games.

174. The two areas where comments on the Further Notice generated some debate are MLB and college football. MLB recently signed new contracts with ABC and NBC for national broadcast coverage and with ESPN for national cable coverage. The broadcast package contains a smaller number of regular season games and, due to the creation of a new round of divisional play-offs, a larger number of post-season games than earlier contracts called for. Moreover, the regular season coverage will be regionalized, as will the coverage of the divisional play-offs and LCS. We recognize that National and American LCS games will now be broadcast at the same time. Thus, it will no longer be possible for an individual to view every game of those series. On the other hand, the new configuration permits all LCS games to be broadcast in prime time, increasing the potential audience. While this change does not constitute migration, we recognize that it does change the overall availability of LCS games.

175. INTV argued that the MLB/ESPN contract, which calls for national cablecast of fewer than half as many games as the previous contract, should be considered "preclusive," by analogy to the statutory definition of preclusive contracts for college athletic conferences. Although the ESPN contract does provide Wednesday night exclusivity vis-a-vis broadcast coverage, it appears likely that the provision has had little effect on the number of games broadcast on local television stations. Rather, local stations have apparently increased their coverage of games on other days of the week. On balance, then, we consider the ESPN contract an addition to output rather than an example of migration or preclusive contracting. At the local level, there are instances of declining broadcast coverage of MLB games, but they appear to be isolated and not indicative of any overall trend.

176. Although we received a substantial amount of information regarding telecasts of college football games and the contracts governing them, certain ambiguities remain. Our assignment with regard to college football was twofold -- to assess whether games had migrated from broadcast television to cable and to evaluate possible preclusive contracts. The record provides some evidence that, at least in a few major markets, the number of

broadcasts by non-network stations has declined. While network broadcast coverage has increased in some of the markets for which we have data, that increase was not enough to offset the non-network decline. While cable coverage increased significantly during the period in question, we were unable to determine that migration of games from broadcast to cable coverage or preclusive contracts caused the non-network decline.

177. With regard to preclusive contracts, our analysis of the typical terms of contracts between college athletic conferences and video programming vendors, suggests that we cannot determine without the sort of factual evidence presented in a full-blown trial whether such contracts violate the antitrust laws. No commenter suggested that these contracts might violate any other statutes. It does seem clear that the college contracts generally do not prohibit local telecasts of local teams' games per se. However, the provisions that limit time periods available for local telecasts and the provisions that lead to many games being chosen for national or regional exhibition only six to twelve days prior to the game date clearly make it more difficult for local stations to contract for games. While it is possible for local stations to sign contingent contracts for carriage of certain local football games, provisions to increase the predictability of network carriage without compromising the benefits of timely selection of network games would certainly make the local stations' task easier.

178. The break-up of the CFA is likely to increase the broadcast coverage of college football, at least at the regional and national levels. However, in view of our concern about the decline in the availability of local college football games on local broadcast stations, we will continue to monitor this area. We therefore urge interested parties to file legitimate complaints with the Commission in the event that current or future college football contracts artificially and unfairly constrain local television stations' ability to televise local teams' games. Complaints should be as detailed and specific as possible. The Commission is committed to pursue such complaints vigorously and promptly. In this regard, should any such complaint indicate that a serious problem exists, we will take whatever further steps may be appropriate.

179. Few commenters explicitly addressed the question of whether additional government action to promote free access to sports programming would be appropriate. Because of the magnitude of sports programming on broadcast television, including the "marquee" events in all sports that we studied, and because our interest in the availability of a diverse menu of programming to the public encompasses both sports and non-sports programming, we have concluded that additional intervention is not warranted. Moreover, we note that because cable and other multichannel media have become widely available and are likely to become even more widely available, access to the vast array of non-broadcast sports programming is not a problem for most households. Most but not all cable sports networks are available on tiers subject to rate regulation. Regulation of cable rates pursuant to the 1992 Cable Act and, in the future, increased competition among multichannel media, provide assurance that rates will be reasonable. These factors mitigate concern regarding the affordability of access to sports programming on subscription media.

180. While it is hard to predict accurately, it appears likely that increased channel capacity on multichannel media will lead to increased availability of sports programming via those media, particularly out-of-market games. The out-of-market games appear conducive to pay-per-view or "pay-per-season" marketing. We recognize that broad and economical access to a variety of sports programming is instrumental to the Commission's goal of ensuring the availability of diverse programming. For that reason, should any significant threat to such access develop, we shall not hesitate to act, consistent with our statutory authority. Although, having fulfilled our statutory mandate, we are closing this docket, we shall remain open to submissions documenting any problems that might arise in the sports programming market. Moreover, we shall convey our findings in this inquiry to the Department of Justice and the Federal Trade Commission, the agencies with primary responsibility for antitrust enforcement. We call their attention particularly to the issue of preclusive college football contracts.

VIII. ADMINISTRATIVE MATTERS

181. This Final Report is issued pursuant to authority contained in Section 26 of the Cable Television and Consumer Protection Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), and Sections 4(i) and 403 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 403.

182. IT IS ORDERED that the Secretary shall send copies of this Final Report to the appropriate committees and subcommittees of the United States House of Representatives and the United States Senate, and to the Attorney General and the Chairman of the Federal Trade Commission.

183. IT IS FURTHER ORDERED that this inquiry into sports programming migration is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

Commenters

ABC	Capital Cities/ABC, Inc.
ARC	Affiliated Regional Communications, Ltd.
Arkansas	University of Arkansas
Big East	Big East Conference and Big East Football Conference
Denver	University of Denver
ESPN	ESPN, Inc.
Fox	Fox Broadcasting Company
INTV	Association of Independent Television Stations, Inc.
Miami	University of Miami
MLB	Office of the Commissioner of Baseball (Major League Baseball)
MLBPA	Major League Baseball Players Association
MSG	Madison Square Garden Corporation
NBA	National Basketball Association
NBC	National Broadcasting Company, Inc.
NCAA	National Collegiate Athletic Association
NCTA	National Cable Television Association, Inc.
NFL	National Football League
NHL	National Hockey League
NLBA	National Licensed Beverage Association
Pac 10	Pacific-10 Conference
Rainbow	Rainbow Programming Holdings, Inc.
SFU	Sports Fans United, Inc. (late-filed)
Southland	Southland Conference
SRL	Satellite Receivers, Ltd., dba Programming Center
Sun Belt	Sun Belt Conference
Time Warner	Time Warner Entertainment Company, L.P.
Tribune	Tribune Broadcasting Company
TSO	Texas Special Olympics
Turner	Turner Broadcasting System, Inc.
UIL	University Interscholastic League

Reply Commenters

ACC	Atlantic Coast Conference
ARC	Affiliated Regional Communications, Ltd.
CBS	CBS Inc.
ESPN	ESPN, Inc.
INTV	Association of Independent Television Stations, Inc.
MLB	Office of the Commissioner of Baseball (Major League Baseball)
NBA	National Basketball Association

NCTA	National Cable Television Association, Inc.
NFL	National Football League
NHL	National Hockey League
Tribune	Tribune Broadcasting Company

CONCURRING STATEMENT
OF
COMMISSIONER JAMES H. QUELLO

RE: Final Report on Sports Migration
PP Docket 93-21

Sports in America is more than just a national pastime -- sports is a national love affair. It is for this reason that I have always approached the issue of sports migration with a caring and careful eye toward ensuring that America's favorite sports are available on free, over-the-air television. This continuing concern is why I am concurring in, rather than voting affirmatively for, this item.

In this proceeding, we have received little evidence of migration in sports generally. However, we have received some evidence, and recognize that there is a problem, in the area of college football -- in particular, a decrease in the number of games aired on local broadcast stations involving local teams. Nonetheless, we conclude in our Report that, because we cannot isolate the cause of the decline in local broadcasts, and because new college football contracts now being negotiated may lead to an increase in network coverage, no legislative or regulatory recommendations are necessary. We promise that we will take action if any significant threat to access to sports programming develops in the future. In particular, we urge parties to file complaints with the FCC in the event current or future college football contracts constrain local stations' access to local team games.

I recognize that we do not have an extensive record with respect to college football. However, we do have data on the record which indicates that the number of non-network college football games has decreased markedly. In a study of nine television markets between 1984 and 1993, INTV demonstrated that local, non-network broadcasts declined from 162 to 42. **This is, in my view, a significant piece of evidence.** What this tells me is that, in at least nine markets throughout the country, television viewers may not able to watch their local college football teams without having to pay. These viewers have the option of either purchasing cable to watch their local teams, or watching a game aired by a broadcast network involving teams of national interest. While these games may have national appeal, in many markets, the hottest ticket in town is local college football; anything else is a distant second.

I am not comfortable in turning away from an evident problem simply because we feel we cannot ascertain with any certainty the source of the problem. Thus, my preference in this proceeding would have been to take what I feel is the most logical next step once one has identified a problem, the extent of which is unclear. That next step could have been to try to ascertain the extent of

the problem, perhaps through a Further Notice focused on college football, or through the conduct of a nationwide study. I am even less comfortable speculating -- and relying on this speculation in our findings -- that the new contracts that will be entered into after the break-up of the CFA in 1995 will lead to the airing of more local games on local stations. If the trend demonstrated by INTV in nine markets were to continue, and if the FCC were to discontinue its oversight role in this area, a more logical prediction would be that even fewer local games will be aired on local stations after the break-up of the CFA. Even with FCC oversight, I am not sure that this result would be avoided.

However, this item ensures that some level of oversight by the Commission will be maintained, and for this reason I am concurring in the Final Report. My colleagues have agreed to continue to monitor this situation very carefully in the future, and, more specifically, to vigorously and promptly pursue complaints filed in the area of college football. In addition, we will convey to the Department of Justice and the Federal Trade Commission our findings in this proceeding, calling their attention in particular to the issue of preclusive college football contracts.

Nevertheless, my comfort level on this issue is still very low. As a result, if this problem with college football broadcasts --or, for that matter, with the broadcast of any type of sports-- begins to worsen, or if specific instances of artificial and unfair contractual contraints are demonstrated, I will respond promptly and aggressively, and urge my colleagues to do likewise.

For the above reasons, I concur.

June 9, 1994

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: Inquiry into Sports Programming Migration, Final Report (PP Docket No. 93-21)

In this Final Report, the Commission finds that there has not been significant migration of sports programming from broadcast to subscription media. The Final Report does express concern, however, regarding a decline in broadcast coverage of college football games in some markets. As a result, the Commission has stated its intention to continue to monitor sports programming availability.

I write separately in support of the findings and conclusions of the Final Report. I also support the recommendation that no legislative or regulatory actions are necessary concerning sports programming migration. With respect to the decline of college football broadcasts in some markets between 1984 and 1993, it appears that the use of preclusive contracts by certain conferences has restricted the availability of college football programming in specific broadcast markets. The Commission has thoroughly evaluated the record in this proceeding, and I support the conclusion that the cause of the decline in local college football broadcasts is uncertain. Given the scope of this proceeding, I believe that we are unable to determine that the decreased college football broadcasts in certain markets are caused solely by the practices of broadcasters and cable entities; the practices of other participants in those negotiated contracts, such as the College Football Association or certain conferences, also must be considered. In this regard, it is important to observe that the instances of the apparent concerns were isolated in specific markets and have not necessarily continued. The record shows that local television stations who alleged restricted opportunities for broadcasts of local teams' games have been able to carry the requested games during subsequent seasons.[1] I believe that these particular occurrences of declining broadcast opportunities in local markets must be balanced with the record's evidence that in other markets, consumers -- as well as certain college football conferences and universities -- may benefit from the opportunities for schools to pursue local cable carriage, especially in situations where local broadcast television stations previously chose not to carry those events.[2] The proceeding's record raises no further evidence of declining broadcast coverage due to migration, and I, therefore, support the conclusion that no additional intervention to promote free access to sports programming is warranted at this time.

The Final Report includes a mechanism for monitoring the developments in the broadcast

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[1] See Letter submitted by Association of Independent Television Stations, June 1, 1994.

[2] See, e.g., Comments of Colorado State University, the Southland Conference, the University of Pittsburgh, and the Sun Belt Conference.

of college football programming. In particular, I support the Commission's effort to monitor activity in broadcast sports programming through the complaint process. Parties are urged to file legitimate complaints in the event that current or future college football contracts unfairly constrain the access of broadcast television stations to local college football games in relation to cable coverage of such sporting events. As a result, the Commission will have the opportunity to pursue any future concerns regarding college football broadcasts as raised in those complaints. I believe that this result, rather than taking further action at this time, strikes the appropriate balance due to the need to (1) observe the results of future practices affecting college football broadcasts following the dissolution of the College Football Association at the end of the coming season; and (2) allow for the resolution of pending litigation. I, therefore, support the Final Report's recommendation that no legislative or regulatory actions are necessary in the area of sports programming at this time.

Before the
Federal Communications Commission
Washington, D.C. 20554

DA 94-707

In the Matter of	)	
	)	
1994 Annual Access Tariff Filings	)	CC Docket No. 94-65
	)	
	)	
Nevada Bell	)	Transmittal No. 196
	)	
Pacific Bell	)	Transmittal No. 1701
	)	
Rochester Telephone Corporation	)	Transmittal No. 222
	)	
Vista Telephone Companies	)	Transmittal No. 30

MEMORANDUM OPINION AND ORDER SUSPENDING RATES

Adopted: June 24, 1994 **Released: June 24, 1994**

By the Deputy Bureau Chief (Policy), Common Carrier Bureau:

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Appendix A - Parties
Appendix B - Analysis of Price Cap Indices

I. EXECUTIVE SUMMARY

1. In this Order,[1] the Common Carrier Bureau reviews the annual access tariff filings that the captioned local exchange carriers (LECs)[2] are required by Section 69.3(a) of the Commission's rules, 47 C.F.R. § 69.3(a), to submit on April 2, 1994, to become effective on July 1, 1994. We also direct certain parties to refile rates, where appropriate, in accordance with this Order.[3]

2. The tariffs filed by the captioned LECs propose $3.5 million in total access increases. These access increases are apportioned among access categories as follows: end user charges would increase by $2.8 million; carrier common line charges would increase by $13.5 million; traffic sensitive charges would decrease by $6.8 million; rates in the interexchange basket would not change; and rates in the new trunking basket would decrease by $5.9 million.

3. In this Order, the Bureau suspends Pacific Bell's annual access tariffs that raise issues concerning how sharing and lower end adjustments should be reflected in Pacific Bell's computation of its earnings and incorporates its tariff into the Commission's pending investigation of the same issues in CC Docket No. 93-193. In addition, this Order rejects proposals made by the petitioners to treat equal access amortizations exogenously. This Order also rejects proposals by Rochester and Vista to include certain regulatory fees as exogenous costs in their price cap indices (PCIs), and instead directs those LECs to adjust their PCIs to reflect endogenous treatment of the fees. Finally, this Order suspends those provisions in the annual access filings, identified by petitioners or the Bureau, that present issues substantially similar to, or closely dependent upon how we resolve, those currently under investigation in CC Docket No. 93-193, and includes those provisions in the 1993 investigation.

II. SHARING ISSUES

A. Pacific Bell Implementation of the Sharing Mechanism

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[1] In a companion Order, the Bureau addresses the annual access filings of the other price cap carriers as well as rate of return carriers. *See* 1994 Annual Access Tariff Filings, Memorandum Opinion and Order, CC Docket No. 94-65, DA 94-706 (released June 24, 1994).

[2] Throughout the Order, we reference the captioned LECs, as follows: Nevada Bell; Pacific Bell; Rochester Telephone Corporation (Rochester); and Vista Telephone Companies (Vista). In citations to, and discussions of, an opposition to the petitions that Rochester and Vista have jointly filed, they are referred to collectively as "Rochester-Vista".

[3] Appendix A contains a list of those parties who filed pleadings in this proceeding and sets forth their full names and the abbreviated versions that are used to refer to them in the text of the Order.

1. Background

4. Under price cap regulation, a LEC is required to make a sharing adjustment to its PCIs if its rate of return for the preceding calendar year exceeds 12.25 percent,[4] and may make a lower end adjustment to its PCIs if its rate of return for that period falls below 10.25 percent.[5] The sharing and lower end adjustments are made as one-time adjustments to a single year's rates.[6] Recently, the Commission tentatively concluded in the *Add-Back Notice* that LECs should continue to be required to reflect the effects of the sharing and lower end adjustments when calculating their rates of return for the year subsequent to the year in which they incurred the sharing or lower end obligation.[7] The Commission further tentatively concluded that the price cap rules should be amended to clarify this requirement.[8]

2. Contentions of the Parties

5. MCI contends that Pacific Bell has understated its sharing obligations by failing to include an adjustment to revenues to offset the effect of the 1993 sharing adjustment.[9] MCI asserts that sharing amounts under price caps, like refunds under rate of return regulation, must be added back in order to ascertain whether any new sharing obligations exist in the current reporting period. Because of these alleged sharing understatements, MCI concludes that Pacific Bell's tariff should be suspended and investigated. MCI also asserts that it fully agrees with the

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[4] The 12.25 benchmark applies to LECs that operate with a 3.3 productivity offset. LECs that elect the more challenging 4.3 productivity offset do not have to make a sharing adjustment unless their rate of return exceeds 13.25 percent. Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd 6786 (1990) (*LEC Price Cap Order*), Erratum, 5 FCC Rcd 7664 (Com. Car. Bur. 1990), *modified on recon.*, 6 FCC Rcd 2637 (1991) (*LEC Price Cap Reconsideration Order*).

[5] For example, under the sharing adjustment a LEC that uses the 3.3 percent productivity offset must share with its customers half of its earnings between 12.25 percent and 16.25 percent, and all of its earnings in excess of 16.25 percent. Under the lower end adjustment, a LEC that posts earnings below 10.25 percent, is entitled to adjust its rates upward to target earnings to 10.25 percent (the "lower end adjustment") in the following year. *LEC Price Cap Order* , at 6788, 6801-02.

[6] *Id.* at 6803; *see also LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2691 n.166.

[7] Price Cap Regulation of Local Exchange Carriers, Rate of Return Sharing And Lower Formula Adjustment, Notice of Proposed Rulemaking, 8 FCC Rcd 4415, 4417 (1993) (*Add-Back Notice*).

[8] *Id.*

[9] MCI Petition at 17-19 and Exhibit II.

Commission's proposal in the *Add-Back Notice* to require the adjustment to offset the earlier sharing adjustment, and that the Commission should not allow LECs to avoid their sharing obligations under price caps.[10] Allnet also maintains that all LECs which implemented sharing amounts in this year's tariff filings should be subject to an accounting order and the outcome of the investigation initiated in the *1993 Annual Access Order*.[11]

6. In opposition to MCI's and Allnet's arguments, Pacific Bell maintains that adoption of an add-back adjustment to offset the sharing adjustment runs counter to the fundamental goals and principles underlying price cap regulation and would be a reversion to rate-of-return principles.[12] Pacific Bell says that the proposal to require such an adjustment would turn an otherwise one-time adjustment to the price cap indices of a LEC that has incurred a sharing obligation into a continuing responsibility continuing over many years.[13] Pacific Bell further asserts that offsetting the sharing adjustment would operate like the permanent automatic stabilizer that the Commission proposed, but declined, to adopt in establishing the price cap system.[14] Pacific Bell states that, even if the Commission does not require this adjustment, it cannot apply that rule to the instant annual access filings because it would be an unlawful retroactive application of a substantive rule change.[15]

3. Discussion

7. In the *1993 Annual Access Order*, the Bureau suspended for one day the tariffs of those LECs that had a sharing or lower end adjustment in 1992, and set those tariffs for investigation, subject to an accounting order.[16] The issue under investigation in that proceeding is how price cap LECs should take into account amounts reflecting prior year sharing or lower end adjustments in computing their rates of return to determine the current year's sharing

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[10] *Id.*

[11] Allnet Petition at 4, *citing*, 1993 Annual Access Tariff Filings, 8 FCC Rcd 4960, 4973 (Com. Car. Bur. 1993) (*1993 Annual Access Order*).

[12] Pacific Bell Reply at 3.

[13] *Id.* at 4.

[14] *Id.*, *citing LEC Price Cap Order*, 5 FCC Rcd at 6803.

[15] Pacific Bell Reply at 4-5, *citing* American Tel. & Tel. v. FCC, 974 F.2d 1351 (D.C. Cir. 1992) (asserting that the Commission cannot require add-back as a purported "clarification" because it would be a substantive rule change).

[16] 8 FCC Rcd at 4965.

obligation and permissible lower end adjustments to the price cap indices.[17] Allnet, AT&T and MCI now advance essentially the same arguments with respect to all LECs that implemented a sharing or lower end adjustment in 1993. The arguments made by the LECs in their replies are also essentially the same as those made by the LECs participating in the 1993 investigation. Because of the similarity of the "add-back" issues raised in both access filings, we are adding the 1994 access transmittals to the 1993 investigation. In addition, as discussed above, the Commission has a pending rulemaking in which it proposed to require LECs incurring a sharing obligation or lower end adjustment in a prior year to adjust their earnings calculations in the following years to remove the effects of the prior-year sharing obligation or lower end adjustment.[18] We therefore suspend Pacific Bell's transmittal and incorporate it into the Commission's pending investigation in CC Docket 93-193.[19] Pacific Bell's transmittal is subject to the accounting order in CC Docket No. 93-193. After the termination of the 1993 investigation and prior to the termination of this investigation, we will give parties an opportunity to present any legal argument or factual circumstances that would lead us to conclude that the decisions reached in CC Docket No. 93-193 on add-back issues should not control our treatment of the 1994 access transmittals.

B. Omission of End User Revenues from the Common Line Basket for Sharing Purposes

1. Background

8. The *LEC Price Cap Order* states that the sharing obligation will be reflected in the PCI for each basket on a cost-causative basis.[20] In implementing this requirement, the *1992 Annual Access Order* required carriers to allocate sharing obligations on a cost-causative basis and found that basket revenues can be used as a proxy for basket costs in all baskets. That Order also concluded that sharing allocations based on basket revenues most closely comports with the goals of the Commission's price cap plan, moving away from cost allocation systems and instead focusing on prices.[21] Thus, for the purposes of calculating the sharing amount to be allocated to the common line basket on a cost-causative basis, common line revenues may be used as a surrogate for common line costs. In the 1993 annual access tariffs, the Bureau designated for investigation the issue of whether Bell Atlantic should be permitted to exclude end user common line charge revenues when it computes the sharing obligation to be apportioned

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[17] *Id.* at 4973.

[18] *See* n.7 *supra*.

[19] *1993 Annual Access Order*, 8 FCC Rcd at 4965, 4973-75.

[20] *LEC Price Cap Order*, 5 FCC Rcd at 6805.

[21] 1992 Annual Access Tariff Filings, CC Docket No. 92-141, 7 FCC Rcd 4731, 4732-33 (Com. Car. Bur. 1992) (*1992 Annual Access Order*).

to the common line basket.[22]

2. Contentions of the Parties

9. AT&T argues that Pacific Bell has impermissibly failed to include its subscriber line revenues in the base period common line basket when it computed the adjustment to that basket's PCI required by its 1993 sharing obligation and thus has not allocated its sharing adjustment among all price cap baskets on a cost-causative basis.[23] AT&T asserts that using the correct revenue amounts would result in a substantial change to Pacific Bell's sharing allocations.[24] Allnet also contends that Pacific Bell has incorrectly omitted subscriber line revenues from its common line baskets.[25] Allnet and AT&T both ask the Commission to impose an accounting order to require Pacific Bell to reallocate its 1993 sharing amounts in accordance with the price cap rules.[26]

10. Pacific Bell responds that, although the Commission requires that sharing adjustments be allocated on a cost-causative basis, it has declined to specify a particular method of reflecting cost-causation.[27] That being so, says Pacific Bell, its use of carrier common line revenues as a proxy for common line costs meets the Commission's cost-causation requirement.[28] Pacific Bell observes that the sharing obligation does not change subscriber line revenues because they are not developed using price cap methods, but rather, from "bottoms up" forecasted cost and demand levels under Part 69 of the Commission's rules.[29]

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[22] *1993 Annual Access Order*, 8 FCC Rcd at 4966

[23] AT&T Petition at 11-12, *citing 1992 Annual Access Order*, 7 FCC Rcd at 4732-33.

[24] According to AT&T, Bell Atlantic's reported common line sharing allocation is 24 percent or $14.633 million, but the correct common line sharing allocation should be 47 percent or $28.404 million. AT&T states that the failure to include subscriber line revenues causes an understatement of Bell Atlantic's common line basket revenues of $13.771 million. AT&T Petition at 12 and Appendix C.

[25] Allnet Petition at 3.

[26] *Id.* at 3-4; AT&T Petition at 11 n.8, *citing* Commission Requirements for Cost Support Material To Be Filed with 1993 Annual Access Tariffs, 8 FCC Rcd 4960, 4973-74 (Com. Car. Bur. 1993) (*1993 TRP Order*).

[27] Pacific Bell Reply at 5-6, *citing* 47 C.F.R. § 61.45(d)(4).

[28] *Id.* at 6.

[29] *Id.*

3. Discussion

11. The issue of excluding subscriber line revenues from the computation of revenues used to allocate the sharing obligation from among baskets is the same issue in our current investigation. We find that administrative convenience would be served by our adding Pacific Bell's transmittal to that investigation. We therefore suspend Pacific Bell's tariff for one day and incorporate it into the Commission's investigation of exclusions of subscriber line revenues for sharing purposes in CC Docket No. 93-193.[30] The Pacific Bell transmittal is also subject to the accounting order in CC Docket No. 93-193. After the termination of the 1993 investigation and prior to the termination of this investigation, Pacific Bell may present any legal argument or factual circumstances that might lead us to conclude that the decisions reached in CC Docket No. 93-193 on sharing allocation issues should not control our treatment of the 1994 access transmittals.

C. Pacific Bell's Reversal of Sharing

1. Background

12. Under the Commission's price cap rules, a sharing obligation imposes a one-time adjustment upon the affected carrier's PCI. Accordingly, after a carrier has fully met its sharing obligation, it must "reverse" the effect of the sharing adjustment on the PCI in order to restore the status quo. The adjustment needed to accomplish this should differ from the original sharing adjustment by the percentage change in basket revenues ("R") from calendar year 1992 to calendar year 1993.[31] Thus, if there was growth in revenues between 1992 and 1993, the adjustment made in the calculation of the 1994 PCI to offset the 1993 sharing adjustment the reversal amount would be increased to reflect that revenue growth. On the other hand, if revenues decreased from 1992 to 1993, the former adjustment would be decreased to reflect that

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[30] *1993 Annual Access Order*, 8 FCC Rcd at 4966, 4973-75.

[31] The Bureau explained how the reversal was to be achieved in the *1994 TRP Order*, stating that

> Because "R," the variable in the PCI formula that equals base period demand multiplied by rates, has changed since the 1993 annual access filings, the amount displayed for the removal of sharing or low end adjustment will not match the original sharing or low end adjustment reported in the 1993 TRP. The amount of the removal should differ from the original sharing or low end adjustment by the percent change in "R" between the 1993 and 1994 annual filings.

Commission Requirements for Cost Support Material To Be Filed with 1994 Annual Access Tariffs and for Other Cost Support Material, 9 FCC Rcd 1060, 1063 n.29 (Com. Car. Bur. 1994) (*1994 TRP Order*).

decline. This allows the percentage adjustment to the PCI made to offset the 1993 sharing adjustment to equal the percentage adjustment due to the original sharing amount.

2. Contentions of the Parties

13. Sprint argues that the percentage change in "R" required to offset Pacific Bell's 1992 sharing obligation as computed by Pacific Bell is too high because it used prior year (1992) revenues that are lower than the 1992 revenues reported in their 1993 annual access filings. Because the change in "R" equals 1993 revenues divided by 1992 revenues, argues Sprint, the change in "R" as computed by Pacific Bell is overstated. According to Sprint, the overstatement has the effect of allowing Pacific Bell to include exogenous cost increases for the reversal amounts which significantly exceed the original sharing amounts.[32]

14. In its reply, Pacific Bell concedes that it used 1993 revenues adjusted for the September 1, 1993 local transport restructure filing to reverse 1992 sharing amounts.[33] Pacific Bell states that because of the small difference resulting from the change in "R" -- $160,000 -- no associated rate changes were necessary.[34] Pacific Bell subsequently amended its tariff to adjust the "R" amount to reflect the correct reversal amount.[35]

3. Discussion

15. We have reviewed the amendment made by Pacific Bell to adjust its "R" amounts to reflect the correct offsetting amounts. We conclude that these amendments adequately address the problem raised by Sprint with regard to offsetting the sharing adjustment made to compute the 1993 PCI. We find that Pacific Bell has included the correct R amounts in its calculations. Therefore, we see no need to investigate this issue.

III. TRANSPORT ISSUES

A. DS3-to-DS1 Transport Rate Ratios

1. Background

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[32] Sprint Petition at 5.

[33] Pacific Bell Reply at 8.

[34] *Id.*

[35] *Id. See also* Pacific Bell Tariff F.C.C. No. 128, Transmittal No. 1701 - Amended, at Revised TRP Worksheet PCI-1, (filed May 13, 1994) (recalculating the sum of 1993 "R" values to be $1,519,242,000); Pacific Bell Tariff F.C.C. No. 128, Transmittal Letter No. 1701 - Amended (filed June 14, 1994) (further modifying allocation methodology of reversal "R" of 1992 sharing to the price cap baskets).

16. Transport is a component of the LECs' interstate switched access service that enables IXCs and other customers to originate and terminate interstate switched telecommunications traffic. Transport refers to the local transmission service between customer points of presence (POPs) and LEC end offices, at which local switching occurs.[36] In its transport rate structure and pricing rulemaking proceeding, the Commission adopted interim rules that restructured the LECs' transport rate structure.[37] In their comments in that proceeding, small and medium IXCs asked the Commission to require LECs to maintain a prescribed ratio between DS1 and DS3 transport rates. The Commission decided to require a DS3-to-DS1 rate relationship only for initial transport rates.[38]

17. Specifically, the Commission concluded that if the ratio of initial DS3 to DS1 transport rates was greater than a benchmark ratio of 9.6-to-1, the rates would be presumed reasonable and generally be allowed to become effective without suspension and investigation.[39] When the Commission subsequently proposed to establish the new trunking basket that would include transport rates small and medium IXCs renewed their proposals that the Commission suspend and investigate the reasonableness of DS3 and DS1 transport rates if their ratio did not exceed a prescribed benchmark ratio.[40] The Commission rejected these proposals, finding that the maintenance of the proposed DS3-to-DS1 benchmark would unnecessarily discourage LECs from lowering their DS3 and DS1 rates.[41]

2. Contentions of the Parties

18. Sprint maintains that, even though there is no rule prohibiting LECs from lowering DS3 transport rates so that the DS3 to DS1 ratio falls below the benchmark of 9.6-to-1 set for

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[36] Transport Rate Structure and Pricing, Second Report and Order, 9 FCC Rcd 615, 616 n.1 (*Transport Second Report and Order*) (1994).

[37] Transport Rate Structure and Pricing, Report and Order, and Further Notice of Proposed Rulemaking, 7 FCC Rcd 7006, 7029-31 (1992) (*Transport Order*), *recon.* First Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 5370 (1993) (*First Reconsideration Order*), *recon.*, Second Memorandum Opinion and Order on Reconsideration, FCC 93-403 (released Aug. 18, 1993) (*Second Reconsideration Order*), *pets. for recon. pending, appeal dismissed sub nom.* New England Tel. and Tel. Co. v. FCC, No. 93-1494 (D.C. Cir. Sept. 7, 1993), *pet. for review pending sub nom.* Full Service Computing Corp. v. FCC, No. 93-1670 (D.C. Cir., filed Oct. 4, 1993).

[38] *Id.* at 7032-34.

[39] *Id.* See *also* 47 C.F.R. § 69.108.

[40] *Transport Second Report and Order,* 9 FCC Rcd at 621-22.

[41] *Id.* at 623.

initial transport rates, Pacific Bell proposes transport rates that will "enable [it] to move further and further away from cost-based rates and to skew IXC competition."[42] According to Sprint, Pacific Bell proposes to lower its current DS3-to-DS1 ratio from 10.89-to-1 to a 10.83-to-1.[43] Sprint maintains that the 9.6-to-1 benchmark ratio for comparing initial DS3 and DS1 transport rates, which the Commission deemed to produce presumptively lawful rates, is "far too low and not reflective of underlying costs."[44] Sprint asserts that because AT&T is able to use proportionally more DS3 access than other IXCs by virtue of its size allowing the BOCs to charge switched DS3 rates that are too low relative to switched DS1 rates gives AT&T an access cost advantage over medium and small IXCs.[45]

19. In its reply, Pacific Bell argues that its DS3 and DS1 rates are in compliance with the Commission's transport rules. Although the rules for initial transport rates required ratio of at least 9.6-to-1 the ongoing transport rates may vary within the limits set by the price cap rules.[46] Pacific Bell further argues that, even if the 9.6-to-1 benchmark for initial transport rates were applied to its proposed ongoing transport rates, they are still well above that benchmark.[47]

3. Discussion

20. As Pacific Bell correctly asserts and Sprint concedes, the Commission's rules do not require the LECs to maintain a benchmark relationship between its 1994 DS3 and DS1 rates Pacific Bell's proposed DS3 and DS1 transport rates are below the applicable price cap and within the governing service bands. Under the circumstances, we conclude that Sprint has failed to show that the DS3 and DS1 transport rates filed by Pacific Bell are patently unlawful or to raise any question regarding these rates that warrants investigation at this time.

B. Tandem-Switched Transport and Direct-Trunked Transport Rates

1. Background

21. In the *Transport Order*, the Commission adopted an interim transport rate structure consisting of flat-rate charges for entrance facilities, direct-trunked transport, dedicated signalling

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[42] Sprint Petition at 3.

[43] *Id.*

[44] Sprint Petition at 2, *citing Transport Order,* 7 FCC Rcd at 7034.

[45] Sprint Petition at 2-3.

[46] Pacific Bell Reply at 2.

[47] *Id.* at 1-2.

transport, and per-minute charges for tandem-switched transport and the interconnection charge.[48] The Commission generally required that initial rates for entrance facilities, direct-trunked transport, dedicated signalling transport, and tandem-switched transport be set on the basis of special access rates, while the interconnection charge initially was to be priced on a residual basis.[49]

22. Direct-trunked transport (DTT) service is transmission of traffic between the LEC serving wire center (SWC) and a LEC end office, or between any two customer-designated LEC offices, that requires no tandem switching.[50] Tandem-switched transport (TST) is transmission of traffic between the SWC and an end office, or between a tandem office and an end office, that is switched at a tandem.[51]

2. Contentions of the Parties

23. Comptel argues that Pacific Bell has increased its TST interoffice rates relative to its DS1 and DS3 DTT interoffice rates.[52] Comptel maintains that Pacific Bell is effectively loading a disproportionate amount of network costs on TST users whose traffic volumes are too low to justify DTT services, and who lack feasible marketplace alternatives to TST.[53] Comptel asserts that Pacific Bell has "decoupled" TST rates from the underlying DS1 and DS3 rates, and completely ignored the copper-to-fiber ratio resulting in an additional cost to TST users of $8 million.[54]

24. In its reply, Pacific Bell asserts that the Commission does not require any direct linkage or benchmark ratio for DTT and TST rates.[55] Pacific Bell concludes that there is no basis for rejection or suspension of its tariffs because the proposed DTT and TST rates are below the applicable price cap and within the governing service bands.[56]

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[48] *Transport Order*, 7 FCC Rcd at 7043-44.

[49] *Id.*

[50] *Transport Second Report and Order*, 9 FCC Rcd at 618 n.7.

[51] *Id.*

[52] Comptel Petition at 3, *citing* Comptel Reply Comments, CC Docket No. 91-213, at 3, 14, 22 (filed Mar. 19, 1993).

[53] Comptel Petition at 4.

[54] *Id.* at 4-5.

[55] Pacific Bell Reply at 2.

[56] *Id.*

3. Discussion

25. As Pacific Bell correctly asserts, the Commission does not prescribe any rate relationships between the TST and DTT service categories, and has granted pricing flexibility for TST rates within the plus-2 and minus-5 service band.[57] Furthermore, the TST rates and DTT rates proposed by Pacific Bell are below the applicable price cap and within the governing service bands. Accordingly, we conclude that Comptel has failed to demonstrate that the TST and DTT rates proposed by Pacific Bell are patently unlawful or to raise any issue that warrants investigation of those rates at this time.

C. Pacific Bell Delta-Y Interexchange Costs

1. Background

26. LECs that provide "corridor" services[58] between their Local Access Transport Areas (LATAs), or interstate intraLATA services are required to impute access charges, including a residual interconnection charge, to themselves and to include revenues from these charges in their interexchange basket. The delta-Y factor is an exogenous cost adjustment that we require LECs to make to the PCI to reflect changes in the levels of interstate access rates that the LECs must impute to themselves when they offer such interstate services.[59]

2. Discussion

27. Allnet maintains that Pacific Bell has excluded the changes to certain access rate elements including the interconnection charge from its calculation of the delta-Y factor through which changes in access charges are imputed to the interexchange basket. Allnet also argues that Pacific Bell calculated local transport revenue using average revenue-per-minute, when it should have used an average of rate element revenues.[60] Pacific Bell maintains in its reply that because it does not have any corridor traffic in its LATAs it does not need to caclulate delta-Y.[61]

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[57] *Transport Second Report and Order*, 9 FCC Rcd at 623, 629-32.

[58] "Corridor" services are interstate offerings generally found in or between large metropolitan areas. Corridor services are provided by certain Bell Operating Companies (BOCs) as exceptions to Modification of Final Judgment prohibitions on the BOCs providing interexchange services. *LEC Price Cap Order,* 5 FCC Rcd at 6811-12 n.252

[59] *See LEC Price Cap Order,* 5 FCC Rcd at 6808; *see also* 47 C.F.R. § 61.44(d); Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873, 3026-39 (1989) (AT&T Price Cap Order).

[60] Allnet Petition at 5.

[61] Pacific Bell Reply at 9.

3. Discussion

28. We have reviewed Pacific Bell's transmittal and find that it is correct. Pacific Bell need not calculate the delta-Y because it does not have any corridor traffic. We therefore conclude that Allnet has neither demonstrated that Pacific Bell has improperly calculated nor raised any question regarding Pacific Bell's calculation of the delta-Y factor that warrants investigation at this time.

IV. EXOGENOUS COST ISSUES

A. Exogenous Treatment of Expiration of Equal Access and Network Reconfiguration Amortization Program

1. Background

29. In a companion order to the Modification of Final Judgment (MFJ)[62], the U.S. District Court required AT&T to guarantee BOCs recovery of the costs of reconfiguring their networks to provide equal access to interexchange carriers (IXCs). The District Court also directed AT&T and the BOCs to develop procedures to account for the equal access and network reconfiguration (EANR) costs.[63] In 1985, AT&T and the BOCs petitioned the Commission to approve a plan of accounting for EANR costs. AT&T and the BOCs estimated that the total equal access expenditures would exceed $2.6 billion and would be incurred over a short period of time.[64]

30. The *EANR Order* identified only certain costs that would be treated as equal access costs, including: (1) initial incremental costs for hardware and software related directly to the provision of equal access, and not otherwise required; (2) costs of connecting offices that service competitive IXCs; and (3) costs that have been incurred as a result of bona fide requests for conversion to equal access.[65] The Commission required the BOCs to amortize EANR costs over

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[62] United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (D.C. Cir. 1983), *aff'd sub nom.*, Maryland v. United States, 460 U.S. 1001 (1983).

[63] United States v. Western Electric Co., Inc., 569 F. Supp. 1057, 1123 (D.D.C. 1983).

[64] Petitions for Recovery of Equal Access Costs, Memorandum Opinion and Order, FCC 85-628, 50 Fed. Reg. 50,910, 50,913-14 n.16 (1985) (*EANR Order*), *aff'd on recon.*, 1 FCC Rcd 434 (1986) (*EANR Reconsideration Order*).

[65] *EANR Order*, 50 Fed. Reg. at 50,912-13; *see also EANR Reconsideration Order*, 1 FCC Rcd at 437 (rejecting proposals to include equal access costs in the amortization "regardless of whether competition exists or a bona fide request for conversion was received").

an eight-year period that would expire on December 31, 1993.[66] The Commission concluded that the establishment of a fixed amortization period with a definite termination point of December 31, 1993, would avoid substantial irregular fluctuations in rates and reduce the administrative burdens of tracking EANR costs.[67]

31. When the Commission established the system of price cap regulation for LECs in 1990, it decided that the costs of conversion to equal access should be treated endogenously.[68] The Commission concluded that according exogenous treatment to equal access costs, whether already incurred[69] or newly arisen, would create perverse incentives for the LECs "to inflate the amounts spent on equal access."[70] In the *LEC Price Cap Reconsideration Order*, the Commission affirmed the decision to treat equal access costs endogenously.[71] In the *1994 TRP Order*, the Bureau rejected AT&T's argument that the expiration of the EANR amortization program should be treated exogenously and should result in a downward adjustment to PCI levels. The Bureau noted that the Commission rejected in *LEC Price Cap Reconsideration Order* a substantially similar argument raised by MCI.[72]

2. Petitions

32. MCI and AT&T argue that, since the costs of EANR were fully amortized on December 31, 1993, the LECs should be required to treat the expiration of the EANR amortization as exogenous.[73] They maintain that all of the price cap carriers have failed to make adjustments to their price cap indices to reflect the full amortization of EANR costs.[74] AT&T estimates that total cost to the BOCs of converting their exchanges and end offices to equal

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[66] *EANR Reconsideration Order,* 1 FCC Rcd at 437.

[67] *Id.*

[68] *LEC Price Cap Order*, 5 FCC Rcd at 6808.

[69] The Commission had found that the largest price cap LECs had already completed conversion to equal access. *LEC Price Cap Order,* 5 FCC Rcd at 6808.

[70] *Id.*

[71] *LEC Price Cap Reconsideration Order,* 6 FCC Rcd at 2666-67.

[72] *1994 TRP Order*, 9 FCC Rcd at 1063, *citing LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2666-67 n.77.

[73] MCI Petition at 20-22; AT&T Petition at 4-5.

[74] AT&T Petition at 2-9; MCI Petition at 20-21.

access is $1.2 billion.[75]

33. MCI and AT&T both liken expiration of the EANR amortization to expirations of the reserve deficiency amortization (RDA) and inside wire amortization (IWA).[76] AT&T cites the concern the Commission expressed in its decision in the *LEC Price Cap Order* to accord exogenous treatment to the RDA, that:[77]

> it would be unfair to ratepayers who are now bearing the cost of the amortization program if rates were not adjusted downward at the end of the program.

AT&T further contends that the Commission's decision to treat the expiration of IWA exogenously to effect a reduction in LEC rates "applies with equal force to the expiration of the EANR amortization."[78]

34. MCI maintains that, just as the Commission had the expectation when it established the RDA and IWA that costs would be fully recovered and corresponding rates would decrease at the end of the amortization, the Commission similarly expected, in establishing the EANR amortization, that rates would decrease when the EANR amortization expired.[79] MCI and AT&T conclude that the Commission must accord exogenous treatment to the expiration of the EANR amortization and adjust downward the price cap indices in order to achieve consistency in the treatment of amortizations that were in effect at the time price cap regulation was established.[80]

3. Replies

35. The LECs contend that AT&T and MCI are in error because the Commission has already rejected proposals to treat the expiration of the EANR amortization exogenously.[81] They

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[75] AT&T Petition at 3.

[76] *Id.* at 5-6; MCI Petition at 22-23, *citing LEC Price Cap Order*, 5 FCC Rcd at 6808; *LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2673-75.

[77] *Id.* at n.8, *citing LEC Price Cap Order*, 5 FCC Rcd at 6808.

[78] *Id.*, at 6 n.9, *citing LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2673-74.

[79] MCI Petition at 23 n.16, *citing EANR Reconsideration Order*, 1 FCC Rcd at 437.

[80] AT&T Petition at 8-9; MCI Petition at 23-24.

[81] Nevada Reply at 3; Pacific Bell Reply at 7; Rochester-Vista Reply at 8-9, *citing LEC Price Cap Order*, 5 FCC Rcd at 6808, *LEC Price Cap Recon Order*, 6 FCC Rcd at 2667 n.77; *1994 TRP Order*, 9 FCC Rcd at 1063.

assert that the Commission concluded in the *LEC Price Cap Order*, and affirmed in the *LEC Price Cap Reconsideration Order*, that all equal access costs are to be treated endogenously.[82] Rochester-Vista also states that AT&T and MCI incorrectly assume that all equal access costs have been recovered with the expiration of the EANR amortization because equal access costs continue to be incurred.[83]

4. Discussion

36. Section 61.45(d) of the Commission's rules, 47 C.F.R. § 61.45(d), restricts the categories of cost changes that price cap LECs are allowed to treat exogenously to those listed and those that the Commission may designate as exogenous. It does not include EANR costs among those listed as exogenous. Therefore, a plain reading of Section 61.45(d) precludes exogenous treatment of EANR costs. Furthermore, as the LECs correctly note the Commission concluded in both the *LEC Price Cap Order* and the *LEC Price Cap Reconsideration Order* that all equal access costs are to be treated endogenously.[84]

37. Specifically, in the *LEC Price Cap Reconsideration Order*, the Commission rejected MCI's proposal to treat BOC equal access costs in the same way as the RDA and IWA amortizations and to require a downward adjustment in PCI levels in 1994 to eliminate all equal access costs.[85] The Commission concluded that there was a "meager factual record presented on the issue of equal access costs" and that the amortization of equal access costs is comparable to changes in depreciation levels that do not require an adjustment to the PCI when the equipment is fully depreciated.[86] As noted above in the *1994 TRP Order*, the Bureau relied on the Commission's prior decision in rejecting AT&T's proposal that the completion of the eight-year EANR amortization be treated exogenously.[87]

38. We believe that exogenous treatment of the EANR amortization would undercut the Commission's goal that the rates permitted under the price cap indices be driven by

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[82] *Id.*

[83] Rochester-Vista Reply at 10.

[84] *LEC Price Cap Order*, 5 FCC Rcd at 6808; *LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2667 n.77.

[85] *LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2667 n.77.

[86] *Id.*

[87] 9 FCC Rcd at 1063 n.28.

competition and market economies.[88] This is so because the Commission specifically found, in establishing price cap regulation and rejecting exogenous treatment of EANR costs, that:

> For the largest carriers, conversion [to equal access] has been largely completed, and its associated costs are embedded in existing rates. This being the case, there is little need to encourage these LECs to convert to equal access by treating the costs of conversions as exogenous.[89]

In addition, even if the EANR amortization did warrant exogenous treatment, such treatment would require a substantive rule change because Section 61.45(d) does not provide for exogenous treatment of the EANR amortization and no LEC has otherwise petitioned for, and been granted, a waiver of that rule. We, therefore, conclude that AT&T and MCI have failed to present a question that warrants investigation at this time.

B. Exogenous Treatment of Regulatory Fees

1. Background

39. The Omnibus Budget Reconciliation Act of 1993 amended the Communications Act of 1934 by adding Section 9. That Section authorizes the Commission to assess and collect annual regulatory fees to recover the costs incurred in carrying out its enforcement activities, policy and rulemaking activities, user information services and international activities.[90] The schedule of fees established by the statute for fiscal year 1994 requires IXCs to pay an annual regulatory fee equal to $60.00 per 1,000 presubscribed access lines, and LECs to pay an annual regulatory fee of $60.00 per 1,000 access lines.[91] The Commission recently adopted regulations

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[88] *See, e.g.* Price Cap Performance Review for Local Exchange Carriers, Notice of Proposed Rulemaking, 9 FCC Rcd 1687, 1699 (1994) (proposing that the Commission should "reduce the categories of cost changes eligible for exogenous treatment where this will improve price cap efficiency incentives").

[89] *LEC Price Cap Order,* 5 FCC Rcd at 6808.

[90] Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 397 (approved Aug. 10, 1993) (*Budget Act*). New Section 9 of the Communications Act of 1934 is codified at Section 159 of Title 47, United States Code, 47 U.S.C. § 159.

[91] 47 U.S.C. § 159(g). The statute requires the Commission to amend the fee schedule in any year after fiscal year 1994 by proportionate increases or decreases that reflect changes in the amount appropriated for that fiscal year for the performance of the Commission's enforcement, policy and rulemaking, information services and international activities. 47 C.F.R. § 159(b). The government's 1994 fiscal year commenced on October 1, 1993, and ends September 30, 1994.

to implement the requirements of Section 9.[92]

40. Section 9(f) of the Act requires the Commission to permit payment by installments for regulatory fees in "large amounts."[93] In the *1994 Fees Order*, the Commission specified "large amounts" to be any fees that "are significantly higher than all others" and to allow entities who have to pay "large amounts" to make two "separate and equally divided" payments in fiscal year 1994 instead of paying the entire amount at once.[94] The Commission identified annual regulatory fees in excess of $500,000.00 to be a "large amount" with respect to LEC holding companies, and any annual fee payment in excess of $700,000.00 to be a "large amount" with respect to IXCs.[95] Thus, any LEC holding company or IXC with annual regulatory fees in excess of the specified amounts is allowed to make two equal installment payments under the rules. Rochester and Vista both propose to treat the regulatory fees at issue exogenously in their annual access filings.[96]

2. Petitions

41. None of the petitioners specifically address Rochester's or Vista's claim that the fees should receive exogenous treatment. Discussing a similar claim by Bell Atlantic, however, MCI contends that Bell Atlantic's proposal to increase its price cap indices by $1.078 million to account for the changes in levels of the Commission's regulatory fees is unwarranted because Section 61.45(d) does not permit exogenous cost treatment for such fees, and Bell Atlantic has not otherwise obtained a waiver.[97] Arguing that the fees are similar to a tax used to generate funding for Commission operations, and the price cap rules specifically deny treatment of tax changes as exogenous, Allnet opposes exogenous treatment of the regulatory fees established by

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[92] Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, Notice of Proposed Rulemaking, MD Docket No. 94-19, FCC 94-46, _ FCC Rcd ___ (released Mar. 11, 1994) (*1994 Fees Notice*); Report and Order, FCC 94-__, MD Docket No. 94-19 (released June 8, 1994) (*1994 Fees Order*).

[93] 47 U.S.C. § 159(f).

[94] *1994 Fees Order* at paras. 36-45.

[95] *Id.*

[96] Rochester Tariff F.C.C. No. 1, Transmittal No. 222, D&J, at 8 (proposing to recover $41,284 (RBU) and $18,615 (subsidiaries) for the period January 1994 through June 1995 during the 1994-1995 tariff year) (filed April 1, 1994); Vista Tariff F.C.C. No. 1, Transmittal No. 30, D&J, at II-2 (proposing to recover $12,000 in fees for the period January 1994 through June 1995 during the 1994-1995 tariff year) (filed April 1, 1994).

[97] MCI Petition at 24. We note that all of the pleadings were filed prior to adoption of the *1994 Fees Order* and thus do not directly address it.

the Budget Act. [98]

42. Allnet further contends that even if it is proper to treat these regulatory fees as exogenous, a LEC should not be permitted to do so because: (1) the amounts to be assessed are still uncertain, as the Commission has not yet established the cut-off date for determining the number of lines to be used for the derivation of the fees; and (2) the Commission has not yet determined whether they are to be assessed at the operating company level, or holding company level.[99] Sprint argues that the Commission should disallow Bell Atlantic's proposal to include $1.078 million in fees as an exogenous cost because it would be premature to allow exogenous treatment prior to adoption of final rules in the rulemaking initiated by the *1994 Fees Notice*.[100]

3. Replies

43. Rochester-Vista maintains that, because the Budget Act regulatory fees are beyond their control and uniquely affect telecommunications firms, they fit squarely within the Commission's definition of an exogenous cost.[101] Rochester-Vista further argues that Allnet's assertion that the new regulatory fees are similar to an endogenous tax law change is incorrect.[102] Rochester-Vista asserts that, even if Allnet's tax analogy were correct, exogenous treatment would still be appropriate because the new regulatory fees uniquely affect telecommunications firms and not the economy generally, and thus meet the Commission's standards for exogenous treatment of a tax.[103]

44. Rochester-Vista also argues that treating the fees exogenously in the 1994 annual access proceeding would not be premature absent a final decision in the rulemaking initiated by the *1994 Fees Notice*.[104] Rochester-Vista reasons that, because the Budget Act authorized the Commission to assess the fees and specified the fee schedule for the first year after enactment, it is reasonably certain that the Commission's proposed fee schedule will become effective

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[98] Allnet Petition at 2-3, *citing LEC Price Cap Order*, 5 FCC Rcd at 6808.

[99] *Id.* at 3.

[100] Sprint Petition at 4, *citing 1994 Fees Notice*.

[101] Rochester-Vista Reply at 11.

[102] *Id.* at 12.

[103] *Id.* at 12 n.29, *citing* Rochester Telephone Corp., DA 91-1431 (Com. Car. Bur. Nov. 15, 1991).

[104] *Id.* at 12-13.

during the forthcoming tariff year.[105]

4. Discussion

45. Section 61.45(d) limits the categories of exogenous costs to those listed in the rule and those designated as such by a Commission Order.[106] The regulatory fees at issue are not included among those costs listed as exogenous in Section 61.45(d), nor have they been designated as such in any Commission Order. Therefore, Rochester Vista's treatment of the fees as exogenous costs violates Section 61.45(d) of the rules. Absent a rulemaking, the only means available to Rochester Vista to obtain exogenous treatment of the regulatory fees is to secure a waiver of Section 61.45(d).[107] Rochester-Vista, however, has not filed a petition seeking waiver of that rule section. Accordingly, we conclude that the Rochester-Vista proposal to treat the regulatory fees exogenously violates our price cap rules and, as such, is patently unlawful. We therefore order Rochester-Vista to recalculate their PCIs in order to reflect endogenous treatment of the regulatory fees required by the Budget Act.

C. Exogenous Treatment of Accounting Changes for Retiree Health Costs

1. Background

46. In December 1990, the Financial Accounting Standards Board (FASB) adopted SFAS-106, which requires companies to account for postretirement benefits other than pensions (OPEBs) on an accrual basis beginning December 15, 1992.[108] Prior to that time, companies accounted for OPEBs on a "pay-as-you-go" basis. Under accrual methods, OPEBS are treated as deferred compensation earned by employees as they work.[109] In addition, SFAS-106 requires companies to book the previously unaccrued OPEB amount for retirees and active employees as of the date that the company adopts SFAS-106. This amount is called the transitional benefit obligation (TBO).[110]

47. The Bureau subsequently approved requests made by two LECs to adopt SFAS-106

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[105] *Id.* at 13.

[106] 47 C.F.R. § 61.45(d).

[107] *See, e.g., 1994 Fees Order*, at n.38; Petition for Waiver of the Commission's Rules to Recover Network Depreciation Costs, 9 FCC Rcd 377 (1993).

[108] *See 1993 Annual Access Order*, 8 FCC Rcd at 4961.

[109] *Id.*

[110] *Id.*

accounting on or before January 1, 1993.[111] The Bureau also directed carriers to use the SFAS-106 option of spreading TBO amounts over prescribed periods of time, in order to avoid the distortion of LEC operating results from a one-time inclusion of the TBO amounts.[112] Several price cap LECs subsequently filed tariffs seeking exogenous treatment of OPEBS, which the Bureau suspended and investigated.[113] In the *OPEB Order*, the Commission denied the LECs' request for exogenous treatment of OPEBs, but did not foreclose further consideration of whether to treat the TBO portion of OPEBS exogenously upon a more complete record.[114]

48. Several LECs then sought exogenous treatment of the TBO amounts in their 1993 annual access tariffs.[115] The Bureau suspended these transmittals, and designated for investigation the issue of whether the LECs have borne their burden of demonstrating that implementing SFAS-106 results in an exogenous cost change for the TBO amounts under the Commission's price cap rules.[116] That investigation is now pending before the Commission.

49. In its 1993 access tariff Rochester sought exogenous treatment of TBO amounts for the period from July 1, 1993 through June 30, 1994.[117] Rochester also sought "retroactive" exogenous treatment for additional TBO amounts for the six-month period preceding the 1993

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[111] Southwestern Bell Corporation, GTE Service Corporation, Notification of Intent To Adopt Statement of Financial Accounting Standards No. 106, Employer's Accounting for Postretirement Benefits Other Than Pensions, 6 FCC Rcd 7560 (Com. Car. Bur. 1991).

[112] Under this option, LECs could either spread the TBO over a twenty-year period, or over the average remaining service period of active plan participants. *Id.*

[113] Treatment of Local Exchange Carrier Tariffs Implementing Statement of Financial Accounting Standards, "Employers Accounting for Postretirement Benefits Other Than Pensions," 7 FCC Rcd 2724 (Com. Car. Bur. 1992).

[114] Treatment of Local Exchange Carrier Tariffs Implementing Statement of Financial Accounting Standards, "Employers Accounting for Postretirement Benefits Other Than Pensions," 8 FCC Rcd 1024, 1037 (1993), *appeal docketed*, Nos. 93-1168, 93-1185, 93-1218 (D.C. Cir., argued May 19, 1994).

[115] Specifically, Ameritech, Bell Atlantic, BellSouth, GTOC, GTSC, Lincoln, NYNEX, Rochester, Southwestern, and U S West sought exogenous treatment for such costs.

[116] *1993 Annual Access Order,* 8 FCC Rcd at 4965, 4973.

[117] These same LECs include exogenous adjustments for these OPEB amounts in their 1994 access tariffs.

tariff year -- from January 1, 1993 through July 1, 1993.[118] In its 1994 access tariff, Rochester now proposes to adjust its PCIs by making an exogenous cost adjustment that would cancel the effect on those PCIs of that portion of the TBO amounts it claimed in its 1993 access tariffs that represents the six-month "retroactive" period.

2. Contentions of the Parties

50. Allnet argues that Rochester should base its proposals to cancel the effect of earlier TBO adjustments on the outcome of the Bureau's investigation of the 1993 annual access tariffs.[119] Allnet further contends that, if the amounts to be reversed are not correctly calculated the rates proposed by Rochester may be overstated.[120] MCI maintains that, because the issue of whether to recognize OPEBs as exogenous cost changes is still pending in the OPEB investigation initiated in 1993, we should suspend this year's price cap access filings for at least one day.[121] Rochester-Vista replies that Rochester correctly included TBO costs in its rate development, just as it did in its 1993 annual access tariff filing, and has provided ample justification for its calculations.[122]

3. Discussion

51. We believe that it is premature to resolve here the issues of whether Rochester should adjust its PCIs to cancel the effect of its previous exogenous cost treatment of TBO amounts, and whether it has identified the correct amounts on which to base that adjustment. Resolution of these issues must await a final Order disposing of the larger and more fundamental questions regarding exogenous treatment of OPEBs being examined in the CC Docket 93-193 investigation.[123] We also find that Allnet raises an important issue as to whether the amounts that LECs propose to remove from their PCIs are correct. Moreover, Rochester, continues to include

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[118] *See, e.g.,* Bell Atlantic D&J, Section 4, at 9-10; NYNEX D&J, at 44-45; U S West D&J, Section 1, at 11-12.

[119] Allnet Petition at 4.

[120] *Id.*

[121] MCI Petition at 25.

[122] Rochester-Vista Reply, at 13-14. Rochester-Vista notes that because Vista did not include any TBO costs in either its 1993 or 1994 annual access tariffs, the issue does not apply to it. *Id.* at n.33

[123] *See 1993 Annual Access Order*, 8 FCC Rcd at 4961-65.

TBO amounts in its 1994 annual access filings, as it did in its 1993 tariff filing.[124] Accordingly, because the issues raised by the Rochester's 1994 tariff filing are substantially similar to those designated for investigation in the *1993 Annual Access Order*,[125] we are suspending for one day the OPEB provisions in the Rochester's transmittal. We are also incorporating Rochester's OPEB provisions into the Docket 93-193 investigation and making those transmittals subject to the accounting order imposed in that docket. After termination of the 1993 investigation and prior to the terminiation of this investigation, we will give Rochester an opportunity to present any legal argument or factual circumstances that might lead us to conclude that the decisions reached in CC Docket No. 93-193 on TBO issues should not control our treatment of Rochester's 1994 access transmittal.

V. OTHER ISSUES

A. Interest on Amounts Reallocated From Regulated to Non-Regulated Accounts

1. Background

52. Under Section 61.45(d)(1)(v) of the rules, 47 C.F.R. § 61.45(d)(1)(v), price cap LECs are required to make exogenous cost adjustments to their PCIs to reflect the amounts of investment that they have reallocated from regulated to non-regulated accounts. In their 1994 access tariffs, BellSouth and NYNEX include exogenous cost adjustments for investments reallocated from regulated to non-regulated accounts.[126]

2. Contentions of the Parties

53. According to Sprint, Nevada Bell has failed to include interest on the reallocated amounts in the exogenous adjustments it made to its PCIs to reflect reallocation of investment from regulated to non-regulated accounts based upon actual 1993 results.[127] Sprint concludes that, as is the case for exogenous adjustments required to meet sharing obligations, the Nevada Bell should include interest at 11.25 percent on reallocated revenue requirement.[128]

54. In its reply, Nevada Bell asserts that there is no rule that requires the inclusion of interest in the calculation of exogenous costs for reallocation of investment from regulated to

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[124] **cite D&Js**

[125] 8 FCC Rcd at 4965.

[126] BellSouth Tariff F.C.C. No. 1, Transmittal No. 197, D&J, at 1-3 and Vol. 2-2, at Tab A; NYNEX Tariff F.C.C. No. 1, Transmittal No. 288, D&J, at 44.

[127] Sprint Petition at 6.

[128] *Id.*

non-regulated accounts.[129] Nevada Bell contends that the analogy Sprint makes between interest on reallocation amounts and the interest required on sharing amounts is flawed. Nevada Bell notes that the price cap rules explicitly require that interest be imputed to any sharing obligation. The rules do not, however, require that interest be imputed to the exogenous treatment of investment reallocations.[130] Nevada Bell additionally notes that, even if interest were required, the overall effect on its price cap baskets would be insignificant because the amount it reallocated from regulated to non-regulated accounts is only $4,159, for which the required interest would be less than $500.[131]

3. Discussion

55. We have reviewed Nevada Bell's proposed treatment of the exogenous costs for reallocation of investment from regulated to non-regulated accounts and all related pleadings. As Nevada Bell correctly avers, there is no rule or policy requiring the inclusion of interest in the calculation of such costs. The rule that governs reallocation from regulated to non-regulated accounts, Section 61.45(d)(1)(v), does not require the inclusion of interest. Moreover, the Commission did not impose any requirement to include interest, or express an intent to establish such a requirement, when it classified reallocations of investment from regulated to non-regulated accounts as exogenous.[132] The Bureau therefore concludes that Sprint has failed to show that the failure of Nevada Bell to include interest on investment reallocated from regulated to non-regulated accounts is patently unlawful.

B. Calculation of Carrier Common Line Rates by Pacific Bell

1. Background

56. Section 61.46(d) of the Commission's rules, 47 C.F.R. § 61.46(d), prescribes the method that price cap LECs are to follow in calculating the maximum allowable carrier common line (CCL) charges that they may impose. In the *1994 TRP Order*, the Bureau established the updated "Chart CCL-1," that price cap LECs were to use to display their computations for deriving their maximum CCL rates, including base period CCL and subscriber line charge demand and rates.[133] The Bureau indicated that Chart CCL-1 defines the level of detailed information it needs detail necessary in order to verify whether a carrier correctly computed the

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[129] Nevada Bell Reply at 5-6.

[130] *Id.*

[131] *Id.* at n.11.

[132] *LEC Price Cap Order*, 5 FCC Rcd at 6807-08.

[133] 9 FCC Rcd at 1061

CCL price cap index.[134] The Bureau further noted that as a general rule:[135]

> Price cap LECs must report all data in the price cap TRP, except rates, in full units of measure with zero decimal places. Individual rates must be reported to the number of decimal places reflected in the company's tariffs. In certain cases, the rates reported on Chart RTE-1 may be aggregate rates, *i.e.*, an average of several rates. In those cases, rates should be displayed to six decimal places.

2. Contentions of the Parties

57. AT&T argues that Pacific Bell will overrecover $1.3 million of carrier common line (CCL) revenues.[136] AT&T concludes that Pacific Bell should be required to reduce its CCL rates to the corrected levels. In its reply, Pacific Bell maintains that any discrepancies AT&T perceives stem from Pacific Bell's having rounded its proposed CCL terminating rates to four decimal places. Pacific Bell argues that no rule specifies that a tariffed rate must be set at six decimal points as AT&T suggests.[137] Pacific Bell, however, subsequently filed an amendment to its transmittal which sets its rates to six decimal places.[138]

3. Discussion

58. We conclude that AT&T has failed to show that Pacific Bell made errors in computing its CCL rates. We agree with Pacific Bell that no Part 69 rule requires that rates be expressed to a certain number of decimal places. We conclude, therefore, that AT&T has failed to show that Pacific Bell's CCL rates are patently unlawful or to raise any issue warranting investigation at this time.

VI. PAPERWORK REDUCTION ACT

59. We are not initiating any investigations in this Order. We have analyzed this Order respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection, or recordkeeping, labelling, disclosure or other record retention

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[134] *Id.* at 1061-62.

[135] *Id.* at 1061 n.14.

[136] AT&T Petition at 13-14. AT&T alleges Pacific Bell calculated the correct CCL rate of $0.007153 per minute, in a workpaper in its transmittal, but filed a rate of $0.007200 per minute.

[137] Pacific Bell Reply at 8-9.

[138] Pacific Bell Tariff F.C.C. No. 128, Transmittal No. 1701 - Amended (filed May 13, 1994).

requirements as contemplated under the statute.[139]

VII. ORDERING CLAUSES

60. Accordingly, IT IS ORDERED that, pursuant to Section 204(a), of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the tariff revisions filed by Pacific Bell that implemented a sharing or lower end adjustment as specified in Section II.A.3, *supra*, ARE SUSPENDED for one day, and are subject to the investigation of 1993 Annual Access Tariff Filings instituted in CC Docket No. 93-193. Pacific Bell SHALL FILE a supplement reflecting this suspension no later than June 29, 1994, to be effective July 1, 1994.

61. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, Pacific Bell, as specified in Section II.A.3, *supra*, SHALL KEEP ACCURATE ACCOUNT of all amounts received that are associated with the tariff filings that are subject to the investigation in CC Docket No. 93-193.

62. IT IS FURTHER ORDERED that, pursuant to Section 204(a), of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the tariff revisions filed by Pacific Bell that exclude subscriber line revenues from the computation that allocates the sharing obligation as specified in Section II.B.3, *supra*, ARE SUSPENDED for one day, and are subject to the investigation of 1993 Annual Access Tariff Filings instituted in CC Docket No. 93-193. Pacific Bell SHALL FILE a supplement reflecting this suspension no later than June 29, 1994, to be effective July 1, 1994.

63. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, Pacific Bell as specified in Section II.B.3 *supra*, SHALL KEEP ACCURATE ACCOUNT of all amounts received that are associated with the tariff filings that are subject to the investigation in CC Docket No. 93-193.

64. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, 47 U.S.C. § 154(i), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the tariff revisions filed by the Rochester Telephone Corporation and the Vista Telephone Companies treating regulatory fees exogenously ARE UNLAWFUL. Rochester Telephone Corporation and the Vista Telephone Companies SHALL RECALCULATE the relevant indices as specified in Section IV.B.4 *supra*. The Rochester Telephone Corporation and the Vista Telephone Companies ARE DIRECTED to file these revised indices on June 29, 1994.

65. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the

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[139] 44 U.S.C. § 3502(4)(A).

Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the tariff revisions including claims for exogenous treatment of OPEBs filed by the Rochester Telephone Corporation as specified in Section IV.C.3 *supra*, ARE SUSPENDED for one day, and are subject to the investigation of 1993 Annual Access Tariff Filings instituted in CC Docket No. 93-193. The Rochester Telephone Corporation SHALL FILE a supplement reflecting this suspension no later than June 29, 1994, to be effective July 1, 1994.

66. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the Rochester Telephone Corporation as specified in Section IV.C.3, *supra*, SHALL KEEP ACCURATE ACCOUNT of all amounts received that are associated with the tariff filings that are subject to the investigation in CC Docket No. 93-193.

67. IT IS FURTHER ORDERED that, all local exchange carriers ARE DIRECTED to revise their PCIs to reflect the 75 day estimate of the GNP-PI in their price cap adjustment filings. These adjustments should be filed no later than June 29, 1994.

68. IT IS FURTHER ORDERED that, any local exchange carrier required to make revisons reflecting GNP-PI and changes in long-term support obligations may file these revisions no later than July 7, 1994, with a scheduled effective date of July 8, 1994.

69. IT IS FURTHER ORDERED that any local exchange carrier that is required to file a supplement reflecting a one day suspension pursuant to this Order, MAY FILE, no later than June 29, 1994, a supplement advancing the currently scheduled effective date to June 30, 1994, and at the same time file a supplement reflecting the one day suspension. For this purpose, we waive Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59. Carriers should cite the "DA" number of the instant Order as the authority for this filing.

70. IT IS FURTHER ORDERED that the petitions to suspend and investigate or to reject the 1994 Annual Access Tariff Filings ARE GRANTED to the extent indicated herein and otherwise ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz

Kathleen B. Levitz
Deputy Bureau Chief
Common Carrier Bureau

Appendix A

Petitions

The following parties filed petitions against the 1994 Annual Access Tariff Filings. The names in parentheses are used for these parties throughout the Order.

Allnet Communications Services, Inc. (Allnet)
American Telephone and Telegraph Company (AT&T)
Competitive Telecommunications Association (Comptel)
MCI Telecommunications Corporation (MCI)
MFS Communications Company (MFS)
Sprint Communications Company, Limited Partnership (Sprint)
WilTel, Inc. (Wiltel)

Replies

The following parties filed replies to the petitions:

Nevada Bell
Pacific Bell
Rochester Telephone Corporation (Rochester); Vista Telephone Company of Minnesota and Vista Telephone Company of Iowa (Vista) (collectively "Rochester-Vista")

Appendix B

Company Codes for the 1994 Annual Access Tariff Filings

	COSA	Company	Study Areas
1	pcca	Pacific Telesis	California
2	ptnv	Pacific Telesis	Nevada
3	rtcs	Rochester	Subsidiaries
4	rtny	Rochester	New York
5	vitc	Rochester	Vista Telephone

ANALYZER
Filing Date: 6/14/94
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	LEC	FCC	Delta	Flag
GENERAL				
GNPPI	0.02836			
X for CL, TS and SP	0.03300			
X for IX	0.03000			
EXOGENOUS CHANGES in thous				
SPF	$0			
DEM	$0			
LTS/TRS	$31,592			
ISW	$0			
RDA	$0			
EDT	$691			
ITC	($1,899)			
REMOVAL SHARING/LOW END	$3,754			
REVISION SHARING/LOW END	$3,805			
SHARING/LOW END ADJ	($13,884)			
TELECOMM.RELAY SVCS.	$715			
OTHER	$0			
TOTAL OF INDIVIDUALS	$24,775			
TOTAL EXOGENOUS	$24,774			
COMMON LINE				
Term Prem CCL Rate	0.00720	0.00719	0.00001	*
Orig Prem CCL Rate	0.00720	0.00719	0.00001	*
g	0.06190			
Proposed PCI	94.6202	94.6202	0.0000	*

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	LEC	FCC	Delta	Flag
TRAFFIC SENSITIVE				
Local Switching				
Proposed SBI	98.0609	98.0609	0.000	*
SBI: Upper Limit	103.7738	103.7738	0.000	*
SBI: Lower Limit	93.8906	93.8906	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
Information				
Proposed SBI	101.2658	101.2658	0.000	*
SBI: Upper Limit	103.7738	103.7738	0.000	*
SBI: Lower Limit	93.8906	93.8906	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
Database Access				
Vert.Services: SBI	100.0000	100.0000	0.000	*
SBI: Upper Limit	103.7738	103.7738	0.000	*
SBI: Lower Limit	93.8906	93.8906	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
Total Database Access				
Proposed SBI	100.0000	100.0000	0.000	*
SBI: Upper Limit	103.7738	103.7738	0.000	*
SBI: Lower Limit	93.8906	93.8906	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
Billing Name and Address				
Proposed SBI	100.0000	100.0000	0.000	*
SBI: Upper Limit	103.7738	103.7738	0.000	*
SBI: Lower Limit	93.8906	93.8906	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
Total Traffic Sensitive				
TS API	98.2795	98.2795	-0.000	*
TS PCI	98.6322	98.6322	0.000	*
LEC API Above PCI?				*
FCC API Above PCI?				*
INTEREXCHANGE				
Interexchange API	82.05	82.05	0.000	*
Interexchange PCI	83.32	83.32	0.000	*
LEC API Above PCI?				LOW
FCC API Above PCI?				LOW

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	LEC	FCC	Delta	Flag
TRUNKING				
Interconnection Charge				
Proposed SBI	98.4784	98.4784	0.000	*
SBI: Upper Limit	98.8670	98.8670	-0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
Tandem Switched Transport				
Proposed SBI	98.5248	98.5248	0.000	*
SBI: Upper Limit	99.3567	99.3567	-0.000	*
SBI: Lower Limit	92.5381	92.5381	-0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
VG, MT, TG				
Proposed SBI	92.4231	92.4231	0.000	*
SBI: Upper Limit	95.9912	95.9912	-0.000	*
SBI: Lower Limit	86.8492	86.8492	-0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
Audio & Video				
Proposed SBI	92.2053	92.2053	0.000	*
SBI: Upper Limit	92.5723	92.5723	-0.000	*
SBI: Lower Limit	83.7559	83.7559	-0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
HICap				
DS1				
Prop Sub-Index	76.9190	76.9190	0.000	*
Sub-Index Up Lim	84.8606	84.8606	-0.000	*
Sub-Index Low Lim	76.7969	76.7969	-0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3				
Prop Sub-Index	78.4205	78.4205	-0.000	*
Sub-Index Up Lim	86.1455	86.1455	-0.000	*
Sub-Index Low Lim	77.9412	77.9412	-0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
Total HICap/DDS				
Proposed SBI	74.1486	74.1486	0.000	*
SBI: Upper Limit	80.4771	80.4771	-0.000	*
SBI: Lower Limit	72.8126	72.8126	-0.000	*
LEC SBI Out?				*
FCC SBI Out?				*
Wideband				
Proposed SBI	0.0000	NONE	0.000	*
SBI: Upper Limit	0.0000	NONE	0.000	*
SBI: Lower Limit	0.0000	NONE	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
Total Trunking				
Trunking API	80.2148	80.2148	0.000	*
Trunking PCI	82.3558	82.3558	-0.000	*
LEC API Above PCI?				LO
FCC API Above PCI?				LO

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	LEC	FCC	Delta	Flag
TRUNKING				
TandemSwitchedTransport Density Zone 1				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
TandemSwitchedTransport Density Zone 2				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
TandemSwitchedTransport Density Zone 3				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
VG DTT/EF Density Zone 1				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
VG DTT/EF Density Zone 2				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
VG DTT/EF Density Zone 3				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*

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Filing Date: 6/14/94
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	LEC	FCC	Delta	Flag
TRUNKING				
DS1 Special Access Density Zone 1				
Prop $	76.1099	76.1099	0.000	*
Sub-I	83.6306	83.6306	-0.000	*
Sub-I	71.6834	71.6834	-0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 Special Access Density Zone 2				
Prop $	78.7161	78.7161	-0.000	*
Sub-I	86.2118	86.2118	-0.000	*
Sub-I	73.8959	73.8959	-0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 Special Access Density Zone 3				
Prop $	80.0866	80.0866	-0.000	*
Sub-I	86.0322	86.0322	-0.000	*
Sub-I	73.7419	73.7419	-0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 DTT/EF Density Zone 1				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 DTT/EF Density Zone 2				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 DTT/EF Density Zone 3				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 Combined Density Zone 1				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 Combined Density Zone 2				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 Combined Density Zone 3				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*

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	LEC	FCC	Delta	Flag
TRUNKING				
DS3 Special Access Density Zone 1				
Prop $	78.0581	78.0581	-0.000	*
Sub-I	86.1455	86.1455	-0.000	*
Sub-I	73.8390	73.8390	-0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 Special Access Density Zone 2				
Prop $	81.6547	81.6547	0.000	*
Sub-I	86.1455	86.1455	-0.000	*
Sub-I	73.8390	73.8390	-0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 Special Access Density Zone 3				
Prop $	82.9635	82.9635	0.000	*
Sub-I	86.1455	86.1455	-0.000	*
Sub-I	73.8390	73.8390	-0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 DTT/EF Density Zone 1				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 DTT/EF Density Zone 2				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 DTT/EF Density Zone 3				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 Combined Density Zone 1				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 Combined Density Zone 2				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 Combined Density Zone 3				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*

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	LEC	FCC	Delta	Flag
GENERAL				
GNPPI				
X for CL, TS and SP	0.02836			
X for IX	0.04300			
	0.04000			
EXOGENOUS CHANGES in thous				
SPF	$0			
DEM	$0			
LTS/TRS	$666			
ISW	$0			
RDA	$0			
EDT	$0			
ITC	($347)			
REMOVAL SHARING/LOW END	($20)			
REVISION SHARING/LOW END	$2,086			
SHARING/LOW END ADJ	$655			
TELECOMM.RELAY SVCS.	($2,954)			
OTHER	$24			
TOTAL OF INDIVIDUALS	($4)			
TOTAL EXOGENOUS	$106			
	$106			
COMMON LINE				
Term Prem CCL Rate	0.00500	0.00737	-0.00237	LOW
Orig Prem CCL Rate	0.00500	0.00737	-0.00237	LOW
g	-0.03150			
Proposed PCI	94.1850	94.1856	-0.0006	*

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	LEC	FCC	Delta	Flag
TRAFFIC SENSITIVE				
Local Switching				
Proposed SBI				
SBI: Upper Limit	84.6767	84.6767	-0.000	*
SBI: Lower Limit	89.4625	89.4625	-0.000	*
LEC SBI Out Bounds?	80.9423	80.9423	0.000	*
FCC SBI Out Bounds?				*
Information				*
Proposed SBI				
SBI: Upper Limit	88.4039	88.4040	-0.000	*
SBI: Lower Limit	90.9634	90.9634	-0.000	*
LEC SBI Out Bounds?	82.3003	82.3003	0.000	*
FCC SBI Out Bounds?				*
Database Access				*
Vert.Services: SBI				
SBI: Upper Limit	100.0000	100.0000	0.000	*
SBI: Lower Limit	102.8174	102.8174	0.000	*
LEC SBI Out Bounds?	93.0252	93.0252	-0.000	*
FCC SBI Out Bounds?				*
Total Database Access				*
Proposed SBI				
SBI: Upper Limit	92.3223	92.3223	0.000	*
SBI: Lower Limit	94.9233	94.9233	-0.000	*
LEC SBI Out Bounds?	85.8830	85.8830	-0.000	*
FCC SBI Out Bounds?				*
Billing Name and Address				*
Proposed SBI				
SBI: Upper Limit	0.0000	NONE	0.000	*
SBI: Lower Limit	0.0000	NONE	0.000	*
LEC SBI Out Bounds?	0.0000	NONE	0.000	*
FCC SBI Out Bounds?				*
Total Traffic Sensitive				*
TS API				
TS PCI	82.5827	82.5827	0.000	*
LEC API Above PCI?	82.6001	82.6001	-0.000	*
FCC API Above PCI?				*
				*
INTEREXCHANGE				
Interexchange API				
Interexchange PCI	90.84	90.84	0.000	*
LEC API Above PCI?	90.84	90.84	-0.000	*
FCC API Above PCI?				*
				*

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	LEC	FCC	Delta	Flag
TRUNKING				
Interconnection Charge				
Proposed SBI				
SBI: Upper Limit	85.8713	85.8713	-0.000	*
LEC SBI Out Bounds?	86.5644	86.5644	0.000	*
FCC SBI Out Bounds?				*
Tandem Switched Transport				*
Proposed SBI				
SBI: Upper Limit	91.7379	91.7378	0.000	*
SBI: Lower Limit	96.4957	96.4957	0.000	*
LEC SBI Out Bounds?	91.7362	91.7362	0.000	*
FCC SBI Out Bounds?				*
VG, MT, TG				*
Proposed SBI				
SBI: Upper Limit	79.30	79.30	0.000	*
SBI: Lower Limit	83.22	83.22	0.000	*
LEC SBI Out Bounds?	75.29	75.29	-0.000	*
FCC SBI Out Bounds?				*
Audio & Video				*
Proposed SBI				
SBI: Upper Limit	90.71	90.71	0.000	*
SBI: Lower Limit	96.84	96.84	-0.000	*
LEC SBI Out Bounds?	87.62	87.62	0.000	*
FCC SBI Out Bounds?				*
HiCap				*
DS1				
Prop Sub-Index	91.32	91.32	-0.000	*
Sub-Index Up Lim	100.93	100.93	0.000	*
Sub-Index Low Lim	91.32	91.32	-0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3				
Prop Sub-Index	91.74	91.74	0.001	*
Sub-Index Up Lim	101.39	101.39	-0.000	*
Sub-Index Low Lim	91.74	91.74	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
Total HiCap/DDS				*
Proposed SBI				
SBI: Upper Limit	87.32	87.32	-0.000	*
SBI: Lower Limit	96.48	96.48	-0.000	*
LEC SBI Out?	87.29	87.29	-0.000	*
FCC SBI Out?				*
Wideband				*
Proposed SBI				
SBI: Upper Limit	0.00	NONE	0.000	*
SBI: Lower Limit	0.00	NONE	0.000	*
LEC SBI Out Bounds?	0.00	NONE	0.000	*
FCC SBI Out Bounds?				*
Total Trunking				*
Trunking API				
Trunking PCI	90.80	90.80	0.000	*
LEC API Above PCI?	96.42	96.42	-0.000	*
FCC API Above PCI?				LO
				LO

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	LEC	FCC	Delta	Flag
TRUNKING				
TandemSwitchedTransport Density Zone 1				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
TandemSwitchedTransport Density Zone 2				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
TandemSwitchedTransport Density Zone 3				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
VG DTT/EF Density Zone 1				
Prop $	0.00	NONE	0.000	*
Sub-I	0.00	NONE	0.000	*
Sub-I	0.00	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
VG DTT/EF Density Zone 2				
Prop $	0.00	NONE	0.000	*
Sub-I	0.00	NONE	0.000	*
Sub-I	0.00	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
VG DTT/EF Density Zone 3				
Prop $	0.00	NONE	0.000	*
Sub-I	0.00	NONE	0.000	*
Sub-I	0.00	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*

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	LEC	FCC	Delta	Flag
TRUNKING				
DS1 Special Access Density Zone 1				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 Special Access Density Zone 2				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 Special Access Density Zone 3				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 DTT/EF Density Zone 1				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 DTT/EF Density Zone 2				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 DTT/EF Density Zone 3				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 Combined Density Zone 1				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 Combined Density Zone 2				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 Combined Density Zone 3				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*

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	LEC	FCC	Delta	Flag
TRUNKING				
DS3 Special Access Density Zone 1				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 Special Access Density Zone 2				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 Special Access Density Zone 3				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 DTT/EF Density Zone 1				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 DTT/EF Density Zone 2				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 DTT/EF Density Zone 3				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 Combined Density Zone 1				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 Combined Density Zone 2				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 Combined Density Zone 3				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*

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	LEC	FCC	Delta	Flag
GENERAL				
GNPPI	0.02830			
X for CL, TS and SP	0.04300			
X for IX	0.00000			
EXOGENOUS CHANGES in thous				
SPF	$0			
DEM	$0			
LTS/TRS	($188)			
ISW	$0			
RDA	$0			
EDT	$0			
ITC	$8			
REMOVAL SHARING/LOW END	$0			
REVISION SHARING/LOW END	$0			
SHARING/LOW END ADJ	($2,139)			
TELECOMM.RELAY SVCS.	$52			
OTHER	($35)			
TOTAL OF INDIVIDUALS	($2,303)			
TOTAL EXOGENOUS	($2,303)			
COMMON LINE				
Term Prem CCL Rate	0.01760	0.01761	-0.00001	*
Orig Prem CCL Rate	0.01000	0.01000	0.00000	*
g	0.05325			
Proposed PCI	77.6286	77.6286	0.0001	*

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	LEC	FCC	Delta	Flag
TRAFFIC SENSITIVE				
Local Switching				
Proposed SBI	98.6036	98.6036	-0.000	*
SBI: Upper Limit	103.4476	103.4476	0.000	*
SBI: Lower Limit	93.5955	93.5955	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
Information				
Proposed SBI	98.0983	98.0983	0.000	*
SBI: Upper Limit	100.5229	100.5229	0.000	*
SBI: Lower Limit	90.9493	90.9493	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
Database Access				
Vert.Services: SBI	0.0000	NONE	0.000	*
SBI: Upper Limit	0.0000	NONE	0.000	*
SBI: Lower Limit	0.0000	NONE	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
Total Database Access				
Proposed SBI	100.3214	100.3214	-0.000	*
SBI: Upper Limit	100.4545	100.4545	0.000	*
SBI: Lower Limit	90.8874	90.8874	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
Billing Name and Address				
Proposed SBI	0.0000	NONE	0.000	*
SBI: Upper Limit	0.0000	NONE	0.000	*
SBI: Lower Limit	0.0000	NONE	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
Total Traffic Sensitive				
TS API	96.4642	96.4642	-0.000	*
TS PCI	96.4876	96.4876	0.000	*
LEC API Above PCI?				*
FCC API Above PCI?				*
INTEREXCHANGE				
Interexchange API	0.00	NONE	0.000	*
Interexchange PCI	0.00	NONE	0.000	*
LEC API Above PCI?				*
FCC API Above PCI?				*

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	LEC	FCC	Delta	Flag
TRUNKING				
Interconnection Charge				
Proposed SBI	86.7257	86.7257	-0.000	*
SBI: Upper Limit	87.0963	87.0963	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
Tandem Switched Transport				
Proposed SBI	86.8096	86.8096	-0.000	*
SBI: Upper Limit	86.8383	86.8383	0.000	*
SBI: Lower Limit	82.7415	82.7415	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
VG, MT, TG				
Proposed SBI	91.27	91.27	0.001	*
SBI: Upper Limit	91.60	91.60	0.000	*
SBI: Lower Limit	82.68	82.68	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
Audio & Video				
Proposed SBI	94.49	94.49	-0.000	*
SBI: Upper Limit	95.23	95.23	0.000	*
SBI: Lower Limit	86.16	86.16	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
HiCap				
DS1				
Prop Sub-Index	79.03	79.03	-0.000	*
Sub-Index Up Lim	86.20	86.20	0.000	*
Sub-Index Low Lim	77.99	77.99	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3				
Prop Sub-Index	95.76	95.76	-0.000	*
Sub-Index Up Lim	96.05	96.05	0.000	*
Sub-Index Low Lim	86.90	86.90	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
Total HiCap/DDS				
Proposed SBI	82.09	82.09	-0.000	*
SBI: Upper Limit	88.10	88.10	0.000	*
SBI: Lower Limit	79.71	79.71	0.000	*
LEC SBI Out?				*
FCC SBI Out?				*
Wideband				
Proposed SBI	0.00	NONE	0.000	*
SBI: Upper Limit	0.00	NONE	0.000	*
SBI: Lower Limit	0.00	NONE	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
Total Trunking				
Trunking API	84.84	84.84	-0.000	*
Trunking PCI	84.85	84.85	0.000	*
LEC API Above PCI?				*
FCC API Above PCI?				*

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	LEC	FCC	Delta	Flag
TRUNKING				
TandemSwitchedTransport Density Zone 1				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
TandemSwitchedTransport Density Zone 2				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
TandemSwitchedTransport Density Zone 3				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
VG DTT/EF Density Zone 1				
Prop $	0.00	NONE	0.000	*
Sub-I	0.00	NONE	0.000	*
Sub-I	0.00	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
VG DTT/EF Density Zone 2				
Prop $	0.00	NONE	0.000	*
Sub-I	0.00	NONE	0.000	*
Sub-I	0.00	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
VG DTT/EF Density Zone 3				
Prop $	0.00	NONE	0.000	*
Sub-I	0.00	NONE	0.000	*
Sub-I	0.00	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*

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	LEC	FCC	Delta	Flag
TRUNKING				
DS1 Special Access Density Zone 1				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 Special Access Density Zone 2				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 Special Access Density Zone 3				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 DTT/EF Density Zone 1				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 DTT/EF Density Zone 2				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 DTT/EF Density Zone 3				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 Combined Density Zone 1				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 Combined Density Zone 2				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 Combined Density Zone 3				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*

ANALYZER
Filing Date: 4/1/94
Filing Entity: RTCS
Transmittal Number: 222
1994 Annual Filing (Filename: rtcsan94)

	LEC	FCC	Delta	Flag
TRUNKING				
DS3 Special Access Density Zone 1				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 Special Access Density Zone 2				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 Special Access Density Zone 3				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 DTT/EF Density Zone 1				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 DTT/EF Density Zone 2				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 DTT/EF Density Zone 3				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 Combined Density Zone 1				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 Combined Density Zone 2				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 Combined Density Zone 3				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*

ANALYZER
Filing Date: 4/1/94
Filing Entity: RTNY
Transmittal Number: 222
1994 Annual Filing (Filename: rtnyan94)
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	LEC	FCC	Delta	Flag
GENERAL				
GNPPI	0.02630			
X for CL, TS and SP	0.04300			
X for IX	0.00000			
EXOGENOUS CHANGES in thous				
SPF	$0			
DEM	$0			
LTS/TRS	($750)			
ISW	$0			
RDA	$0			
EDT	$0			
ITC	$0			
REMOVAL SHARING/LOW END	$0			
REVISION SHARING/LOW END	$0			
SHARING/LOW END ADJ	$0			
TELECOMM.RELAY SVCS.	$95			
OTHER	($689)			
TOTAL OF INDIVIDUALS	($1,344)			
TOTAL EXOGENOUS	($1,344)			
COMMON LINE				
Term Prem CCL Rate	0.00781	0.00781	-0.00000	*
Orig Prem CCL Rate	0.00781	0.00781	-0.00000	*
g	0.00118			
Proposed PCI	92.6867	92.6867	-0.0000	*

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ANALYZER
Filing Date: 4/1/94
Filing Entity: RTNY
Transmittal Number: 222
1994 Annual Filing (Filename: rtnyan94)
Page 2 of 6

	LEC	FCC	Delta	Flag
TRAFFIC SENSITIVE				
Local Switching				
Proposed SBI	83.8202	83.8202	-0.000	*
SBI: Upper Limit	87.9564	87.9563	0.000	*
SBI: Lower Limit	79.5796	79.5796	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
Information				
Proposed SBI	82.5219	82.5219	-0.000	*
SBI: Upper Limit	84.8157	84.8157	0.000	*
SBI: Lower Limit	76.7380	76.7380	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
Database Access				
Vert.Services: SBI	0.0000	NONE	0.000	*
SBI: Upper Limit	0.0000	NONE	0.000	*
SBI: Lower Limit	0.0000	NONE	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
Total Database Access				
Proposed SBI	86.8865	86.8866	-0.000	*
SBI: Upper Limit	89.3015	89.3015	0.000	*
SBI: Lower Limit	80.7966	80.7966	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
Billing Name and Address				
Proposed SBI	0.0000	NONE	0.000	*
SBI: Upper Limit	0.0000	NONE	0.000	*
SBI: Lower Limit	0.0000	NONE	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
Total Traffic Sensitive				
TS API	77.7197	77.7197	-0.000	*
TS PCI	77.7549	77.7549	0.000	*
LEC API Above PCI?				*
FCC API Above PCI?				*
INTEREXCHANGE				
Interexchange API	0.00	NONE	0.000	*
Interexchange PCI	0.00	NONE	0.000	*
LEC API Above PCI?				*
FCC API Above PCI?				*

ANALYZER
Filing Date: 4/1/94
Filing Entity: RTNY
Transmittal Number: 222
1994 Annual Filing (Filename: rtnyan94)
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	LEC	FCC	Delta	Flag
TRUNKING				
Interconnection Charge				
Proposed SBI	99.8431	99.8431	0.000	*
SBI: Upper Limit	70.1363	70.1361	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
Tandem Switched Transport				
Proposed SBI	71.0112	71.0112	-0.000	*
SBI: Upper Limit	71.5390	71.5388	0.000	*
SBI: Lower Limit	66.6294	66.6293	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
VG, MT, TG				
Proposed SBI	108.43	108.43	0.000	*
SBI: Upper Limit	109.99	109.99	0.000	*
SBI: Lower Limit	99.51	99.51	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
Audio & Video				
Proposed SBI	102.30	102.30	-0.000	*
SBI: Upper Limit	105.07	105.07	0.000	*
SBI: Lower Limit	95.06	95.06	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
HICap				
DS1				
Prop Sub-Index	93.27	93.27	-0.000	*
Sub-Index Up Lim	99.43	99.43	0.000	*
Sub-Index Low Lim	89.96	89.96	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3				
Prop Sub-Index	110.86	110.86	-0.000	*
Sub-Index Up Lim	113.86	113.86	0.000	*
Sub-Index Low Lim	103.01	103.01	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
Total HICap/DDS				
Proposed SBI	95.66	95.66	0.000	*
SBI: Upper Limit	100.80	100.80	0.000	*
SBI: Lower Limit	91.20	91.20	0.000	*
LEC SBI Out?				*
FCC SBI Out?				*
Wideband				
Proposed SBI	0.00	NONE	0.000	*
SBI: Upper Limit	0.00	NONE	0.000	*
SBI: Lower Limit	0.00	NONE	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
Total Trunking				
Trunking API	99.32	99.32	-0.000	*
Trunking PCI	99.32	99.32	0.000	*
LEC API Above PCI?				*
FCC API Above PCI?				*

ANALYZER
Filing Date: 4/1/94
Filing Entity: RTNY
Transmittal Number: 222
1994 Annual Filing (Filename: rtnyan94)
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	LEC	FCC	Delta	Flag
TRUNKING				
TandemSwitchedTransport Density Zone 1				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
TandemSwitchedTransport Density Zone 2				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
TandemSwitchedTransport Density Zone 3				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
VG DTT/EF Density Zone 1				
Prop $	0.00	NONE	0.000	*
Sub-I	0.00	NONE	0.000	*
Sub-I	0.00	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
VG DTT/EF Density Zone 2				
Prop $	0.00	NONE	0.000	*
Sub-I	0.00	NONE	0.000	*
Sub-I	0.00	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
VG DTT/EF Density Zone 3				
Prop $	0.00	NONE	0.000	*
Sub-I	0.00	NONE	0.000	*
Sub-I	0.00	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*

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ANALYZER
Filing Date: 4/1/94
Filing Entity: RTNY
Transmittal Number: 222
1994 Annual Filing (Filename: rtnyan94)
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	LEC	FCC	Delta	Flag
TRUNKING				
DS1 Special Access Density Zone 1				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 Special Access Density Zone 2				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 Special Access Density Zone 3				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 DTT/EF Density Zone 1				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 DTT/EF Density Zone 2				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 DTT/EF Density Zone 3				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 Combined Density Zone 1				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 Combined Density Zone 2				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 Combined Density Zone 3				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*

ANALYZER
Filing Date: 4/1/94
Filing Entity: RTNY
Transmittal Number: 222
1994 Annual Filing (Filename: rtnyan94)
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	LEC	FCC	Delta	Flag
TRUNKING				
DS3 Special Access Density Zone 1				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 Special Access Density Zone 2				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 Special Access Density Zone 3				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 DTT/EF Density Zone 1				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 DTT/EF Density Zone 2				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 DTT/EF Density Zone 3				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 Combined Density Zone 1				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 Combined Density Zone 2				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 Combined Density Zone 3				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*

ANALYZER
Filing Date: 4/1/94
Filing Entity: VITC
Transmittal Number: 172
1994 Annual Filing (Filename: TRP94)
Page 1 of 6

	LEC	FCC	Delta	Flag
GENERAL				
GNPPI	0.02830			
X for CL, TS and SP	0.04300			
X for IX	0.00000			
EXOGENOUS CHANGES in thous				
SPF	$0			
DEM	$0			
LTS/TRS	$17			
ISW	$0			
RDA	$0			
EDT	$0			
ITC	$0			
REMOVAL SHARING/LOW END	$265			
REVISION SHARING/LOW END	$0			
SHARING/LOW END ADJ	($812)			
TELECOMM.RELAY SVCS.	$40			
OTHER	$13			
TOTAL OF INDIVIDUALS	($478)			
TOTAL EXOGENOUS	($478)			
COMMON LINE				
Term Prem CCL Rate	0.01819	0.01819	-0.00000	*
Orig Prem CCL Rate	0.01000	0.01000	0.00000	*
g	0.07804			
Proposed PCI	85.3269	85.3268	-0.0000	*

ANALYZER
Filing Date: 4/1/94
Filing Entity: VITC
Transmittal Number: 172
1994 Annual Filing (Filename: TRP94)
Page 2 of 6

	LEC	FCC	Delta	Flag
TRAFFIC SENSITIVE				
Local Switching				
Proposed SBI	86.9164	86.9164	-0.000	*
SBI: Upper Limit	91.2661	91.2661	-0.000	*
SBI: Lower Limit	82.5741	82.5741	-0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
Information				
Proposed SBI	88.0163	88.0163	-0.000	*
SBI: Upper Limit	92.2762	92.2762	-0.000	*
SBI: Lower Limit	83.4880	83.4880	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
Database Access				
Vert.Services: SBI	0.0000	NONE	0.000	*
SBI: Upper Limit	0.0000	NONE	0.000	*
SBI: Lower Limit	0.0000	NONE	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
Total Database Access				
Proposed SBI	98.8571	98.8571	-0.000	*
SBI: Upper Limit	101.1269	101.1269	-0.000	*
SBI: Lower Limit	91.4958	91.4958	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
Billing Name and Address				
Proposed SBI	0.0000	NONE	0.000	*
SBI: Upper Limit	0.0000	NONE	0.000	*
SBI: Lower Limit	0.0000	NONE	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
Total Traffic Sensitive				
TS API	85.7719	85.7719	-0.000	*
TS PCI	85.7720	85.7720	-0.000	*
LEC API Above PCI?				*
FCC API Above PCI?				*
INTEREXCHANGE				
Interexchange API	0.00	NONE	0.000	*
Interexchange PCI	0.00	NONE	0.000	*
LEC API Above PCI?				*
FCC API Above PCI?				*

ANALYZER
Filing Date: 4/1/94
Filing Entity: VITC
Transmittal Number: 172
1994 Annual Filing (Filename: TRP94)
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	LEC	FCC	Delta	Flag
TRUNKING				
Interconnection Charge				
Proposed SBI	96.1277	96.1277	-0.000	*
SBI: Upper Limit	96.1312	96.1312	-0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
Tandem Switched Transport				
Proposed SBI	98.0083	98.0083	0.000	*
SBI: Upper Limit	98.0538	98.0538	-0.000	*
SBI: Lower Limit	91.3247	91.3247	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
VG, MT, TG				
Proposed SBI	83.68	83.68	-0.000	*
SBI: Upper Limit	90.17	90.17	-0.000	*
SBI: Lower Limit	81.58	81.58	-0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
Audio & Video				
Proposed SBI	99.32	99.32	0.000	*
SBI: Upper Limit	100.94	100.94	0.000	*
SBI: Lower Limit	91.32	91.32	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
HICap				
DS1				
Prop Sub-Index	88.65	88.65	-0.000	*
Sub-Index Up Lim	90.94	90.94	0.000	*
Sub-Index Low Lim	82.26	82.26	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3				
Prop Sub-Index	0.00	NONE	0.000	*
Sub-Index Up Lim	0.00	NONE	0.000	*
Sub-Index Low Lim	0.00	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
Total HICap/DDS				
Proposed SBI	90.87	90.87	-0.000	*
SBI: Upper Limit	92.69	92.69	-0.000	*
SBI: Lower Limit	83.86	83.86	0.000	*
LEC SBI Out?				*
FCC SBI Out?				*
Wideband				
Proposed SBI	0.00	NONE	0.000	*
SBI: Upper Limit	0.00	NONE	0.000	*
SBI: Lower Limit	0.00	NONE	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
Total Trunking				
Trunking API	96.32	96.32	-0.000	*
Trunking PCI	96.32	96.32	0.000	*
LEC API Above PCI?				*
FCC API Above PCI?				*

ANALYZER
Filing Date: 4/1/94
Filing Entity: VITC
Transmittal Number: 172
1994 Annual Filing (Filename: TRP94)

	LEC	FCC	Delta	Flag
TRUNKING				
TandemSwitchedTransport Density Zone 1				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
TandemSwitchedTransport Density Zone 2				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
TandemSwitchedTransport Density Zone 3				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
VG DTT/EF Density Zone 1				
Prop $	0.00	NONE	0.000	*
Sub-I	0.00	NONE	0.000	*
Sub-I	0.00	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
VG DTT/EF Density Zone 2				
Prop $	0.00	NONE	0.000	*
Sub-I	0.00	NONE	0.000	*
Sub-I	0.00	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
VG DTT/EF Density Zone 3				
Prop $	0.00	NONE	0.000	*
Sub-I	0.00	NONE	0.000	*
Sub-I	0.00	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*

ANALYZER
Filing Date: 4/1/94
Filing Entity: VITC
Transmittal Number: 172
1994 Annual Filing (Filename: TRP94)

	LEC	FCC	Delta	Flag
TRUNKING				
DS1 Special Access Density Zone 1				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 Special Access Density Zone 2				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 Special Access Density Zone 3				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 DTT/EF Density Zone 1				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 DTT/EF Density Zone 2				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 DTT/EF Density Zone 3				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 Combined Density Zone 1				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 Combined Density Zone 2				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 Combined Density Zone 3				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*

ANALYZER
Filing Date: 4/1/94
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1994 Annual Filing (Filename: TRP94)

	LEC	FCC	Delta	Flag
TRUNKING				
DS3 Special Access Density Zone 1				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 Special Access Density Zone 2				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 Special Access Density Zone 3				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 DTT/EF Density Zone 1				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 DTT/EF Density Zone 2				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 DTT/EF Density Zone 3				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 Combined Density Zone 1				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 Combined Density Zone 2				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 Combined Density Zone 3				
Prop $	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
Sub-I	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*

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